Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

2. Whether, in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1 petitioners state that all parties to the proceeding in the court whose judgment is sought to be review are, in addition to those listed in the caption above:

Jose E. Mena, as plaintiff below;

City of Simi Valley
Randy G. Adams
Marvin Hodges
Roy Jones
Vincent Allegra
Alan McCord
Richard Thomas
Ronald Chambers
William Lappin
Arnold Baynard
Jeffrey Dominick
Jack Greenburg
Richard Lamb
Frank Ahlvers
John Adamczyk
Tim Brown, as defendants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Darin L. Muehler and Robert Brill respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion for summary judgment on qualified immunity grounds (*Mena I*) was reported at 226 F.3d 1031 (9th Cir. 2000) and is reproduced in the appendix (Pet. App.) at 55a-72a. The judgment of the district court was unpublished and is reproduced at Pet. App. 48a-54a. The order of the trial court denying petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment was unpublished and is reproduced at Pet. App. 35a-47a. The opinion of the court of appeals affirming the trial court's judgment against petitioners (*Mena II*) was published at 332 F.3d 1255 (9th Cir. 2003) and is reproduced at Pet. App. 1a-22a. The order of the court of appeals denying rehearing en banc was published at 354 F.3d 1015 (9th Cir. 2004) and is reproduced at Pet. App. 23a-34a.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. An order denying petitioners' petition for rehearing and suggestion for rehearing en banc was entered on January 14, 2004. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 of Title 42 to the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents two recurring constitutional questions of great significance to law enforcement officers throughout the nation. The first is whether officers who have lawfully detained an individual engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity. The second is whether the detention of individuals for two to three hours

while a valid search warrant for weapons is fully executed is rendered constitutionally impermissible if the individuals were initially detained at gun-point and handcuffed for the duration of the search. The Ninth Circuit answered both questions in the affirmative, holding not only that police officers executing a search warrant violated the Fourth Amendment by detaining occupants of the premises in handcuffs and by questioning them about their immigration status, but also that the Fourth Amendment violations were so "clearly established" as to negate the officers' qualified immunity defense. These plainly erroneous rulings warrant plenary review by this Court.

1. During January and February of 1998, petitioners Darin Muehler and Robert Brill were officers with the Simi Valley Police Department ("SVPD") assigned to a special gang unit. See Appellant's Excerpts of Record (Appellant's Excerpts of R.) at 256, 258. On January 13, 1998, petitioners were assigned to investigate a gang-related drive-by shooting. *Id.* at 258. Three assailants in a light green Toyota Tercel fired multiple shots at individuals standing in front of 355 Bonita Drive in Simi Valley. *Id.* Soon after the shooting, police stopped a light green Toyota Tercel with three occupants: Delfino Vasquez, Ricardo Bravo, and Raymond Romero. *Id.* at 259. Both Vasquez and Bravo confessed to the shooting, while Romero invoked his Miranda rights in response to questioning. *Id.* at 259-60. During their investigation, petitioners discovered that the shooting arose out of a rivalry between two Simi Valley gangs: the West Side Locos, of which Vasquez, Bravo, and Romero were members, and the Varrio Simi Valley, several of whose members lived at 355 Bonita Drive. *Id.* at 259-61. Police recovered a .22 caliber handgun that was fired in the January 13 shooting; however, several .25 caliber bullets were found in the car, and one .25 caliber bullet was found in Romero's pocket. *Id.* at 259-60.

Vasquez and Bravo told SVPD officers that Romero possessed a chrome .25 caliber semi-automatic handgun and

that he had attempted to fire that handgun at the Varrio Simi Valley members on January 13. Appellant's Excerpts of R. 260. Vasquez and Bravo also stated that Romero had hidden the handgun at the residence of another West Side Locos member immediately after the shooting. *Id.* Vasquez and Bravo's story was corroborated by Gabriel Reyes, a member of Varrio Simi Valley who had seen Romero with a chrome handgun. *Id.* at 261. This information was particularly significant, because a .25 caliber handgun had been used in the unsolved November 28, 1997 shooting of a Varrio Simi Valley member. See *id.* at 260.

Based upon this information, petitioners believed that Romero, who had been released, likely had recovered the .25 caliber handgun. See Appellant's Excerpts of R. 260-61. Petitioners also learned from Romero's family that Romero was living at 1363 Patricia Avenue in a "poor house" – a single-family home that housed a large number of unrelated individuals who rented space in rooms in the house, in the furnished garage, and in motorhomes and vans parked in the backyard. Pet. App. 56a-57a. Additionally, petitioners learned that at least one other member of the West Side Locos was either living or had lived in the same house. *Id.* at 56a-57a. Based on their experience, the officers concluded that 1363 Patricia Avenue may have been a safe house for the West Side Locos. See Appellant's Excerpts of R. 177.

Petitioners secured a search warrant for 1363 Patricia Avenue on January 29, 1998, which authorized them to search for, among other things, "'[d]eadly weapons'" and "'evidence of street gang membership or affiliation with any street gang.'" Pet. App. 57a (alteration in original). The warrant authorized a search both of the house and of the vehicles on or adjacent to the property. Appellant's Excerpts of R. 253. The search warrant was executed at 1363 Patricia Avenue at approximately 7:00 AM on the morning of February 3, 1998. Pet. App. 2a. Petitioners were the investigating officers responsible for overseeing the search.

Id. Because of the strong evidence that armed gang members may have been present at 1363 Patricia Avenue and because officers had encountered resistance during previous visits to the home, the officers decided to use a Special Weapons and Tactics (SWAT) team to clear the residence and secure any occupants before the search. See Appellant's Excerpts of R. 67-69, 77, 80. The SWAT team discovered four individuals on the premises; each was handcuffed and brought to a furnished garage for the duration of the search. Pet. App. 25a, 59a, 67a.

Respondent Iris Mena was asleep in her bed when a SWAT team officer broke down her padlocked door, pointed his weapon at her, handcuffed her and walked her into the garage. Pet. App. 3a, 25a. The garage had been furnished with several beds, where respondent sat with the other three occupants. *Id.* at 29a. Respondent was wearing sweatpants and a long-sleeved shirt when she was brought into the garage, but the officers brought her a jacket and shoes. *Id.* at 25a She was permitted to move around the garage, and in fact she moved from one bed to another while the search progressed. See Appellant's Excerpts of R. 160. Because the officers were uncertain of her connection to the West Side Locos and because they were concerned that she might interfere with the search, the officers did not remove her handcuffs. See *id.* at 93-94, 182. She never asked for her handcuffs to be loosened. *Id.* at 163.

Knowing that many of the West Side Locos' members were illegal immigrants, SVPD officers notified the Immigration and Naturalization Service (INS) before the search was initiated. Pet. App. 27a, 33a. While respondent and the other occupants were detained, an INS officer arrived at the garage and the occupants were asked about their immigration status. *Id.* at 7a, 25a, 59a. The officers learned that one of the detainees was an illegal alien, and they took him into custody. See Appellant's Excerpts of R. 132. Like the others, respondent, who has a Salvadorean accent, was asked whether

she was a legal alien. Pet. App. 7a, 25a. After she answered she was further asked for her immigration papers; she directed the officers to a purse in her room, in which they discovered her papers. *Id.* at 25a-26a.

The search lasted approximately two to three hours, Pet. App. 3a, 59a,[1] and the officers discovered and seized a .22 caliber handgun with ammunition, baseball bats with gang writing and other gang paraphernalia, and a quantity of marijuana. Appellant's Excerpts of R. 95-96. After the search was complete, respondent and the other occupants were released. Pet. App. 3a, 59a. Other than the initial handcuffing, respondent had no physical contact with the officers. Appellant's Excerpts of R. 161.

Respondent filed an action against petitioners under 42 U.S.C. § 1983, alleging that they violated her rights under the Fourth and Fourteenth Amendments by, *inter alia*, "arresting and detaining plaintiff Iris Mena for an unreasonable time and in an unreasonable manner and without probable cause or reasonable suspicion."[2] Appellant's Excerpts of R. 3. Petitioners and their co-defendants argued that they had qualified immunity for any alleged wrongs, and filed a motion for summary judgment on that ground. Pet App. 59a-60a. The district court denied that motion and the Ninth Circuit affirmed that denial. *Id.* at 59a-60a, 70a. At trial, a jury found petitioners liable for violating respondent's Fourth Amendment right against unreasonable seizures. *Id.* at 50a-

[1] The officers who performed the search testified that the search lasted no longer than two hours. Pet. App. 59a n.3; Appellant's Excerpts of R. 85, 96, 183.

[2] Respondent's initial complaint alleged multiple constitutional violations by the City of Simi Valley and eighteen police officers, and was filed along with co-plaintiff Jose Mena, respondent's father and the owner of the house on 1363 Patricia Avenue. Appellant's Excerpts of R. 1-8. As a result of the trial court's dismissal of some of the plaintiffs' claims and the jury's rejection of others, the only issues remaining are respondent's claims against the petitioners.

51a. Petitioners filed a motion to alter or amend judgment under Fed. R. Civ P. 59(e), which the trial court denied. *Id.* at 35a-36a.

2. The Ninth Circuit upheld the trial court's judgment on two independent grounds. First, the court concluded that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to detain Mena at gun-point and to keep her in handcuffs during the course of the search. Pet. App. 8a-10a. The Ninth Circuit opined that, because Mena was not a "suspect," "the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals." *Id.* at 9a. The court held that, because Mena was not a suspect, the police should not have detained her at gun-point or "us[ed] handcuffs for an extended period," and instead "should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest." *Id.* (footnote omitted). The court further held that the officers were not entitled to qualified immunity because *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), and *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), clearly established the right to be free "from the type of search Mena allege[d]." Pet. App. 15a.

Second, the panel held that the officers had violated Mena's clearly established constitutional rights "by inquiring unnecessarily into her citizenship status." Pet. App. 10a. The panel reached this conclusion despite the fact that this basis for liability was neither briefed by the parties nor presented to the jury. See *id.* at 27a & n.3, 34a n.2. Nevertheless, the panel held that, because the officers did not have a reasonable particularized suspicion that Mena was not a citizen, they were forbidden to ask her any questions about it. *Id.* at 10a The panel found that the officers' questions were an unreasonable seizure under the Fourth Amendment; it did not consider the Fifth or Sixth Amendments in reaching its conclusion. See *id.* at 14a. The panel concluded that the

officers were not entitled to qualified immunity in light of *United States* v. *Brignoni-Ponce*'s requirement that officers have reasonable suspicion in order to stop individuals to investigate their immigration status. See 422 U.S. 873, 884 (1975); Pet. App. 14a.

3. Over the votes of seven dissenting judges, petitioners' suggestion for rehearing en banc was denied. Pet. App. 24a, 25a, 33a. The dissenting judges pointed out that the panel's conclusion that an officer's questions about citizenship created a Fourth Amendment violation was a proposition that directly conflicted with a decision of the Seventh Circuit and that "[n]o reasonable police officer would have imagined . . . was the law." *Id.* at 26a (Kleinfeld, J., dissenting), *id.* at 33a (Gould, J., dissenting). Furthermore, the dissenters argued that the panel's conclusion that the manner in which Mena was detained violated the Fourth Amendment eviscerated the rule, announced in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that "'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.'" Pet. App. 30a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J., dissenting). The dissenters concluded that,

> [f]or their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting.

Id. at 31a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J. dissenting).

REASONS FOR GRANTING THE PETITION

This case presents two fundamental constitutional questions that have divided the courts of appeals, are squarely posed by the decision below and are therefore now ripe for resolution by this Court. The first is whether the mere questioning of an individual who has been lawfully seized can constitute an additional, unreasonable seizure. The Ninth Circuit's conclusion that an officer's question to a constitutionally seized individual can constitute a second "seizure" requiring reasonable suspicion parallels the holdings of the Eighth, Tenth, and Eleventh Circuits. These decisions are in fundamental conflict with the conclusions of the Fourth, Fifth, and Seventh Circuits that mere questioning by the police of a lawfully detained individual cannot constitute a new "seizure."

1. This Court has reaffirmed repeatedly that "mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *INS* v. *Delgado*, 466 U.S. 210, 216 (1984); *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion). In particular, this Court has recognized that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Delgado*, 466 U.S. at 216. Law enforcement officers may ask questions of individuals they approach in the street, on a bus, or at their work, "even when . . . [they] have no basis for suspecting a particular individual." *Bostick*, 501 U.S. at 434-35; *Delgado*, 466 U.S. at 218. Such questioning does not implicate the Fourth Amendment "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *Delgado*, 466 U.S. at 216.

Mendenhall, *Royer*, *Delgado*, and *Bostick* all dealt with police questions of individuals who were not detained or

otherwise "seized" when the officers initiated questioning. *Bostick*, 501 U.S. at 431-32; *Delgado*, 466 U.S. at 218; *Royer*, 460 U.S. at 493-95; *Mendenhall*, 446 U.S. at 548. This Court has yet to consider whether the Fourth Amendment can be violated by police questioning of individuals who have already been seized, whether such seizure was pursuant to an arrest, an investigative stop or, as in this case, a detention during the execution of a search warrant. The courts of appeal have split on this question. Some circuits have held that police questioning of a lawfully seized individual does not constitute a new seizure any more than police questioning of a citizen on the street. Other circuits have held, as the Ninth Circuit did in this case, that the Fourth Amendment prohibits officers from asking questions of lawfully seized individuals that they are free to ask of an individual on the street.

The Ninth Circuit's conclusion that petitioners needed reasonable suspicion before they could inquire about a lawfully detained individual's citizenship echoes the conclusions of three other circuits. The Eighth Circuit, the Tenth Circuit, and the Eleventh Circuit have all held that questions asked of a lawfully detained individual can constitute an additional, and unreasonable seizure under the Fourth Amendment unless the questions are based on reasonable suspicion. See *United States* v. *Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc) (per curiam) (holding that police questioning of a motorist during a traffic stop "on matters unrelated to the purpose of the initial stop" could be "so intrusive as to violate the Fourth Amendment"); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) (holding that officer violated Fourth Amendment by asking "unrelated questions" of individual stopped for speeding); *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (holding that officer making traffic stop is limited to asking "questions reasonably related to the stop"). These courts have drawn a distinction between questions that are "related" to the

purpose of the lawful detention and questions that are "unrelated," and have held that officers need reasonable suspicion to expand the scope of questioning to "unrelated" areas. See *United States* v. *Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002); *Pruitt*, 174 F.3d at 1221; *United States* v. *Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States* v. *Barahona*, 990 F.2d 412, 416 (8th Cir. 1993) ("For a detention to be reasonable, an officer's questions must relate to the purpose of the stop. However, if the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.") (citations omitted).

The Fourth, Fifth and Seventh Circuits, on the other hand, have rejected the claim that questions asked of a lawfully detained individual can constitute a Fourth Amendment violation. See *United States* v. *Chacon*, 330 F.3d 323, 328-29 (5th Cir. 2003); *Martinez-Camargo* v. *INS*, 282 F.3d 487, 493 (7th Cir. 2002); *United States* v. *Childs*, 277 F.3d 947, 949-50 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Machuca-Barrera*, 261 F.3d 425, 432 & n.21 (5th Cir. 2001); *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (table) (per curiam), *available at* 1999 WL 96121, at *2; *United States* v. *Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States* v. *Shabazz*, 993 F.2d 431, 436-37 (5th Cir. 1993).

The Seventh Circuit analyzed the issue of police questioning of lawfully detained individuals in detail in its en banc decision in *Childs*. In that case, an officer stopped a driver for failing to wear a seat belt and asked him whether he was carrying any marijuana, even though the officer had no particularized reasonable suspicion of drug possession. The *Childs* court found that the question about drugs did not constitute a separate seizure, reasoning that "because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry." 277 F.3d at 949.

The court found support for its conclusion in this Court's explicit treatment of police questioning of persons not in formal custody and implicit acceptance, for Fourth Amendment purposes, of police questioning of prisoners. See *id.* at 950-51 (citing *Bostick*, 501 U.S. at 434, and *Texas* v. *Cobb*, 532 U.S. 162 (2001)). From these decisions the *Childs* court drew the logical conclusion that "[t]o say that questions asked of free persons and questions asked of prisoners are not 'seizures' but that questions asked of suspects under arrest *are* seizures would have neither the text of the Constitution behind it nor any logical basis under it." *Id.* at 951.

The Fourth and Fifth Circuits have similarly "reject[ed] any notion that a police officer's questioning, even on a subject unrelated to the purpose of a lawful stop, is itself a Fourth Amendment violation," on the ground that "[m]ere questioning . . . is neither a search nor a seizure." *Shabazz*, 993 F.2d at 436; see *Chacon*, 330 F.3d at 328-29 (holding that unrelated questions about drugs asked during immigration inspection were not a seizure); *Machuca-Barrera*, 261 F.3d at 432 n.21 ("[D]etention, not questioning, implicates the Fourth Amendment"); *Jacobs*, 1999 WL 96121, at *2 ("[M]ere questioning by the police, even on a subject unrelated to the purpose of the stop, is not itself a Fourth Amendment violation."); *Crain*, 33 F.3d at 485 (holding that unrelated questioning during traffic stop was not a seizure).

The stark conflict between the decisions of the Fourth, Fifth, and Seventh Circuits and those of the Eighth, Ninth, Tenth, and Eleventh Circuits on whether the questioning of a lawfully detained individual can violate the Fourth Amendment is an issue of national importance to law enforcement that is ripe for resolution by this Court. This issue arises often and in a variety of contexts: from traffic stops, see *Childs*, 277 F.3d at 949-51, to immigration inspections, see *Chacon*, 330 F.3d at 328-29, to detentions during the execution of search warrants. See Pet. App. 10a-14a. The uncertainty in the Fourth Amendment's application

to these various contexts has a negative effect on officers' performance of their duties to investigate crime.

The Ninth Circuit's determination that officers can be held liable in damages for asking a question of a lawfully detained individual has a particularly chilling effect. The boundary between questions that are permissibly "related" to the basis for a valid detention and those that are unconstitutionally "unrelated" will often be unclear. Indeed, in this very case, the officers were authorized to search for "'evidence of street gang membership'"; they knew that members of the gang who might reside at the premises were primarily illegal immigrants; they found respondent at those premises; and they were unsure of her connection to the gang. Pet. App. 57a, 27a, 33a; Appellants' Excerpts of R. 93-94. In these circumstances, it is far from obvious that respondent's immigration status was completely unrelated to her detention. In all events, officers forced to make difficult judgment calls in the field should not face liability if a jury disagrees months or years later with such on-the-spot decisions.[3] Moreover, the "relationship" test that the Eighth, Ninth, Tenth, and Eleventh Circuits Circuits employ will inevitably spawn much protracted litigation. For these reasons this Court should resolve this uncertainty by granting the petition for certiorari.

2. The Ninth Circuit's particular holding in the present case that questions regarding immigration status may not be posed to a lawfully detained individual without reasonable suspicion directly conflicts with the Seventh Circuit's decision in *Martinez-Camargo*. The Ninth Circuit held that "the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status. . . . [when] there was

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[3] Indeed, given the on-the-spot nature of the inquiry, and the fact that several other circuits have concluded that such inquiries do not implicate the Fourth Amendment at all, the Ninth Circuit's determination that the officers should have known their questioning was unconstitutional, and thus are not entitled to qualified immunity, is plainly erroneous.

no reason evident in the record to be suspicious of her citizenship status." Pet. App. 10a. The Ninth Circuit supported this conclusion with a dramatically expansive reading of this Court's decision in *Brignoni-Ponce*, 422 U.S. at 878-84. In *Brignoni-Ponce*, this Court held that Border Patrol officers must have reasonable suspicion that individuals may be illegal aliens in order to *stop* individuals for questioning. See *id.* at 884. The Ninth Circuit, however, cited *Brignoni-Ponce* for the proposition that an officer must have reasonable suspicion that an individual is not a citizen in order "to *interrogate* that individual regarding his citizenship," and applied this proposition to find a Fourth Amendment violation predicated on questions alone. Pet. App. 10a (emphasis added).

In *Martinez-Camargo*, the Seventh Circuit rejected a claim that an officer's questions regarding alienage, which were asked during a valid Terry stop, violated the Fourth Amendment. See 282 F.3d at 493. The Seventh Circuit found that the officers' questions were "neither searches nor seizures," and concluded that the questions asked during the stop "did not constitute a seizure independent and distinct from the original investigatory stop." *Id.* The direct conflict between the Ninth Circuit and Seventh Circuit as to the permissibility of officers' asking detained individuals about their immigration status compellingly supports a grant of certiorari in this case.

3. The alternative ground for the Ninth Circuit's decision presents a similarly significant constitutional issue. The court below gave a particularly expansive interpretation of the "unusual case" exception of *Michigan* v. *Summers* – an interpretation that conflicts both with the intent of *Summers* and with the decisions of other federal courts of appeal.

In *Michigan* v. *Summers*, this Court held that the Fourth Amendment permits officers executing a search warrant to detain occupants of a residence during the course of the search. See 452 U.S. at 704-05. The Court held that the

detention of an occupant during a search could be justified by several law enforcement interests, including "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm to the officers," and facilitating "the orderly completion of the search." *Id.* at 702-03. The Court recognized that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* The court also noted that the very existence of a search warrant "provides an objective justification for the detention," for the search warrant shows that a neutral magistrate has found "probable cause to believe that someone in the home is committing a crime." *Id.* at 703. In light of this probable cause determination, police have "an easily identifiable and certain basis" for concluding that detention of a home's occupant is necessary – "[t]he connection of . . . [the] occupant to that home." *Id.* at 703-04.

Summers thus held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises *while* a proper search is conducted." *Id.* at 705 (emphasis added; internal footnotes omitted). The Court noted that, "[a]lthough special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case," it held that a "routine detention of residents of a house while it [is] being searched for contraband pursuant to a valid warrant is not such a case." *Id.* at 705 n.21. The "unusual case" posited by *Summers* therefore requires something more than a mere "routine detention." Indeed, with the exception of the Ninth Circuit's decision in this case, every other court of appeals to consider the question has found "unusual cases" only in truly egregious circumstances that were far removed from the circumstances in this case. The Ninth Circuit has therefore staked out a position that is irreconcilable with the language of *Summers* and the decisions of other courts of appeals.

The Ninth Circuit's decision that respondent's detention was unreasonable rests upon a broad reading of the "unusual case" exception. In almost every aspect, petitioners conducted a routine search with a routine detention of the occupants. They were investigating "a gang-related drive-by shooting – clearly a serious crime," Pet. App. 8a – in a residence they reasonably thought was a gang safe house. While respondent was "not the subject of this investigation," *id.*, the officers had no idea who she was or what her relationship to the gang might be when they encountered her padlocked door. Breaking that door down and pointing a weapon at respondent when the officers first encountered her was hardly unusual or egregious conduct under the circumstances. To the contrary, it was plainly designed to "prevent[] flight," "minimiz[e] the risk of harm to the officers," and to convey the necessary "unquestioned command of the situation." *Summers*, 452 U.S. at 702-03.

Nor was it unusual to detain respondent in handcuffs in a furnished room for two to three hours while the police recovered a variety of weapons, drugs and gang paraphernalia from the premises. The search itself required this amount of time because the officers needed to search both the house and the several vans and motorhomes on the property. See Pet. App. 57a Moreover, the officers were searching for weaponry that they reasonably thought had been used by members of a violent street gang in a drive-by shooting – facts that would lead the officers to conduct the search more cautiously and thus more slowly. See *id.* During the time the search was conducted, Mena was free to move about the furnished room, she was given a jacket and shoes, and she did not complain that the handcuffs were too tight.

Other courts of appeal have squarely contradicted the Ninth Circuit's conclusion that a detention of this nature constitutes an "unusual case." See *Pikel* v. *Garrett*, 55 Fed. Appx. 29, 32 (3d Cir. 2002); *United States* v. *Fountain*, 2 F.3d 656, 661-63 (6th Cir. 1993). In *Pikel*, the Third Circuit held that law

enforcement officers who handcuffed employees during a three and one half hour search of a business were entitled to qualified immunity. 55 Fed. Appx. at 32. In *Fountain*, the Sixth Circuit held that handcuffing and forcing occupants to lie face down was not an "unusual case" under *Summers* in light of legitimate law enforcement interests in preventing flight and minimizing risk of harm. 2 F.3d at 663.[4]

Other courts of appeal have only found the "unusual case" in extreme circumstances that involve something more than detaining someone initially at gun-point then handcuffing them for two to three hours. See *Williams* v. *Kaufman County*, 352 F.3d 994, 1011 (5th Cir. 2003) (holding that three-hour detention during which plaintiffs were strip-searched was unreasonable); *Levito* v. *Lapina*, 258 F.3d 156, 172-73 (3d Cir. 2001) (holding that eight-hour detention of plaintiff during search was unreasonable). *Jacobs* v. *City of Chicago*, 215 F.3d 758, 772 (7th Cir. 2000) (holding that detention violated Fourth Amendment where search was illegal and officers should have discovered mistake before detaining plaintiff for three hours); *Heitschmidt* v. *City of Houston*, 161 F.3d 834, 836 (5th Cir. 1998) (holding that detention of plaintiff in painfully tight handcuffs for over four hours violated Fourth Amendment); *Pecsi* v. *Doyle*, 940 F.2d 661 (6th Cir. 1991) (table) (per curiam), *available at* 1991 WL 137597 (holding that detention violated Fourth Amendment where officers held plaintiff for five to six hours total and at gunpoint for two to three hours); see also *Franklin*, 31 F.3d at 876-77 (holding that officers' detention of man who had advanced multiple sclerosis and who was

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[4] *See also Mitchell* v. *Unified Gov't*, No. Civ. A. 00-2116-CM, 2000 WL 1920036, at *9 (D. Kan. Dec. 21, 2000) (finding that officers had qualified immunity for two and one half hour handcuffed detention); *Crosby* v. *Hare*, 932 F. Supp. 490, 492 (W.D.N.Y. 1996) (holding that officers acted reasonably when they detained subjects for two hours during search, during 90 minutes of which subjects were in handcuffs).

partially nude in handcuffs for over two hours violated Fourth Amendment).

Indeed, the utter irreconcilability of the Ninth Circuit's decision in the present case with the decisions of other circuits was confirmed by the Ninth Circuit itself in *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). In *Meredith* the Ninth Circuit confronted another claim of an unreasonable detention in handcuffs during execution of a search warrant. See *id.* at 1063. While the Ninth Circuit concluded that the officer's use of handcuffs without justifiable circumstances violated the Fourth Amendment, the court nevertheless held that the officers had qualified immunity. See *id.* It reasoned that "[a]t the time of the search, July 10, 1998, it was not clearly established in this *(or any other) circuit* that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Id.* (emphasis added). This recognition that no other circuit had concluded that handcuffing could render a detention incident to a valid search unreasonable confirms that the Ninth Circuit's decision in this case conflicts with the decisions of other courts.[5]

That conflict is highlighted by the fact that the court found that petitioners were not entitled to qualified immunity, and thus that it was "clearly established" that detaining an occupant at gun-point and handcuffing her for the two to three hours required to search the premises satisfied *Summers*' "unusual case" exception. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

[5] Obviously, in the ordinary case, it is not the province of this Court to resolve intra-circuit conflicts, but here seven judges of the en banc court would have set aside the judgment. Thus, apart from the circuit conflict, the issue presented here will be decided differently by different panels of the Ninth Circuit. That kind of arbitrary outcome merely reinforces the need for review by this Court.

Saucier v. *Katz*, 533 U.S. 194, 202 (2001). The Ninth Circuit's conclusion that the unlawfulness of handcuffing during a *Summers* detention was "apparent" only highlights the deep conflict between its interpretation of the "unusual case" exception and that of other circuits. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). Indeed, even when courts from other circuits have found "unusual cases," it is only in the most egregious of cases that the courts have found that the officers were not entitled to qualified immunity for their actions. See *Williams*, 352 F.3d at 1011 (holding that although three-hour detention during which plaintiffs were strip-searched was unreasonable, officer was entitled to qualified immunity); *Levito*, 258 F.3d at 172-73 (holding that although eight-hour detention of plaintiff during search was unreasonable, agents were entitled to qualified immunity because it was not clear that *Summers* barred such a detention).

In sum, the Ninth Circuit has placed substantial obstacles in the way of reasonable law enforcement efforts. Mere questioning regarding a lawfully detained individual's immigration status is now a Fourth Amendment violation, and effective detention during the entire duration of a lawful and reasonable search is a clear violation of the Constitution. These holdings are plainly harmful to efforts to keep the peace and place officers in harm's way. This is intolerable and the Court should intervene now to decide these fundamental issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 13, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-56673

IRIS MENA,
Plaintiff-Appellee,
and
JOSE E. MENA,
Plaintiff,
v.

CITY OF SIMI VALLEY; RANDY G. ADAMS; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants,
and
DARIN L. MUEHLER; ROBERT BRILL,
Defendants-Appellants.

Argued and Submitted Feb. 4, 2003
Filed June 23, 2003

Appeal from the United States District Court for the Central District of California; A. Howard Matz, District Judge, Presiding. D.C. No. CV-98-08512-AHM.

Before PREGERSON and REINHARDT, Circuit Judges, and ARCHER,[1] Senior Circuit Judge.

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[1] The Honorable Glenn L. Archer, Jr., Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION

PREGERSON, Circuit Judge.

Iris Mena brought this action in the district court under 42 U.S.C. § 1983, alleging that Robert Brill and Darin L. Muehler, both City of Simi Valley police officers, used excessive force and restrained her for an unreasonable period of time during a search of her home. The officers appeal the district court's judgment entered on a jury verdict. They argue that the district court erred in ruling that they are not entitled to qualified immunity. Additionally, the officers contend that they are entitled to a new trial on the unlawful detention claim because the district court abused its discretion (1) in denying the officers' proposed instruction on unlawful detention; (2) through its conduct during voir dire; and (3) through its cross-examination of defense witnesses during trial. The officers also argue that the award of punitive damages to Mena should be vacated as unsupported by substantial evidence. We have jurisdiction to hear this appeal under 28 U.S.C. § 1291, and we affirm.

Facts and Procedural Background

Just before 7:00 a.m. on February 3, 1998, several officers from the Simi Valley Police Department (SVPD) SWAT team executed a valid search warrant at 1363 Patricia Avenue. Brill and Muehler were directly responsible for supervising the search. The police officers searched the residence as part of their investigation of a gang-related drive-by shooting. The officers believed that Raymond Romero, the officers' primary suspect, was residing in the house, a single-family dwelling housing many unrelated residents. Iris Mena was a resident in the house, which was owned by her father, Jose Mena. The police officers forcibly entered the residence and observed that some of the rooms were locked, many with padlocks on the outsides of the doors. The officers proceeded to force entry into these locked

rooms, including the bedroom in which Mena was sleeping. The officers, wearing SWAT team paraphernalia, found Mena in bed, and, pointing a submachine gun at her head, turned her over onto her stomach and handcuffed her. After searching her person and her room, the officers led Mena—barefoot and still wearing her pajamas—outside through the rain to a cold garage. Although she was absolutely compliant, the officers detained Mena in handcuffs for approximately two to three hours. While the police officers held Mena in the garage, the officers did not explain to her the reason she was being detained. During her detention, an immigration officer who had joined the police on the search asked Mena questions concerning her citizenship status. Upon learning from Mena that her citizenship documentation was in her purse, a police officer searched her purse without her consent. The police officers did not release Mena from the handcuffs until after they completed the search of the premises, at which time they finally informed her why she had been detained.

On October 19, 1998, Mena brought an action under 42 U.S.C. § 1983, alleging that the police officers violated her civil rights in connection with the February 3, 1998, search of her home. Specifically, she contended that (1) the search warrant and search were overbroad; (2) the officers detained Mena unlawfully; (3) the officers detained her in an unreasonable manner; and (4) the officers failed to comply with the "knock and announce" rule before entering the house. The defendants moved for summary judgment on the ground that Mena's constitutional rights were not violated, or, alternatively, that the officers were entitled to qualified immunity. On August 10, 1999, the district court issued an order denying summary judgment, holding that because "a reasonable trier of fact could conclude that the warrant and/or its execution was 'overbroad'" and "a reasonable trier of fact could conclude that Iris Mena's detention was unreasonable," defendants were not entitled to qualified immunity as a matter

of law. The officers appealed, and we affirmed, except as to the claim that the warrant was overbroad on its face. *See Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir.2000) (*Mena I*). On that claim, we reversed and remanded for the entry of summary judgment in favor of the appellants. *Id.* at 1037-38.

On June 12, 2001, trial began on Mena's Fourth Amendment claims. On June 21, 2001, the trial concluded and the jury returned a verdict finding that Muehler and Brill violated Mena's Fourth Amendment right to be free from unreasonable seizure by detaining her with unreasonably excessive force and for a longer period than was reasonable. The jury found Muehler and Brill each liable to Mena in the amount of $10,000 in compensatory damages and $20,000 in punitive damages. On July 11, 2001, the district court entered judgment against Muehler and Brill.

During trial, the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in which the Court clarified the proper approach to evaluating claims of qualified immunity. On July 25, 2001, the defendants filed a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e) based on a purported intervening change in qualified immunity law; for a new trial under Fed.R.Civ.P. 59(a) on the ground that the district court's jury instruction on unlawful detention was legally erroneous; and for judgment as a matter of law under Fed.R.Civ.P. 50(b) based on an asserted lack of evidence to substantiate the jury's punitive damages award. The district court denied that motion, and the officers now appeal.

Discussion

I. Qualified Immunity

Muehler and Brill argue that they should be shielded from liability to Mena under the doctrine of qualified immunity.[2] "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier*, 533 U.S. at 200, 121 S.Ct. 2151; *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The central interest that underlies the doctrine of qualified immunity is that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Although this court has already affirmed the district court's pre-trial determination that the officers were not entitled to qualified immunity with respect to the claim of unlawful detention, *inter alia, Mena I*, 226 F.3d at 1039-41, the officers argue that *Saucier* effected an intervening change in the law sufficient to amend our earlier decision and dismiss the excessive force claims based on qualified immunity.

Under *Saucier,* the first step in determining whether an official is entitled to qualified immunity is to consider whether the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 200-01, 121 S.Ct. 2151; *accord Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir.2002) (en banc). Assuming a constitutional violation could be established on a favorable view of the plaintiff's submissions, "the next, sequential step

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[2] We review de novo a district court's decision regarding qualified immunity. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994); *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir.2001).

is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. But "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Because law as to what is considered reasonable develops over time, courts must determine whether the law was clearly established at the time of the alleged constitutional violation. *Robinson*, 278 F.3d at 1013 (noting that "the law at that time must be our guide").

A. Whether Mena Asserts a Violation of a Constitutional Right

To evaluate the officers' claim that they are entitled to qualified immunity, we first accept the facts as Mena alleges them and determine whether those facts point to a constitutional violation. According to Mena, at least eighteen members of the Simi Valley Police Department (SVPD) SWAT team forcibly gained entry into her home just after dawn on February 3, 1998. Awakened abruptly by a loud noise, Mena opened her eyes to find "a person dressed in black pointing a gun with a light on top" at her face. Mena, especially startled in her sleepy haze, assumed that the individual wearing dark clothes and a balaclava[3] and pointing an MP-5 submachine gun at her head had come in "to rob and

[3] A sophisticated type of ski mask, a balaclava conceals the features of the face during a SWAT raid. The SWAT officers also wore helmets and goggles.

kill" her. Mena emphasizes that throughout this initial encounter no person identified himself as a police officer. Not until an officer pushed Mena onto her bed, face down, and placed handcuffs on her was she able to *infer* that these were police officers, because she assumed that police officers are "the only persons that put handcuffs on people." The officers searched Mena and her room, yanked her up from her bed by her shirt, and led her out of her room in her pajamas. Although it was raining outside and Mena was barefoot, the officers directed her outside and into a cold garage, where she was detained for two to three hours.

During her detention, an officer questioned Mena about her citizenship status. Following that, an INS agent who accompanied the SVPD on the search asked her more specific questions about her immigration status. Although Mena was a legal resident of this country at the time, the INS agent asked her where her immigration documentation was, and upon learning that the papers were in her purse, a police officer proceeded to search it without her consent. The police officer then turned the papers over to the INS agent, who subsequently inspected them.

On these facts, there is no doubt that Mena has alleged a violation of her constitutional rights under the Fourth Amendment. The Fourth Amendment protects citizens from unreasonable government seizures. U.S. Const. amends. IV, XIV; *Camara v. Municipal Ct.*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). To succeed on a claim of unreasonable search or seizure under the Fourth Amendment, a plaintiff must show (1) the existence of a search or seizure and (2) that the search or seizure was unreasonable or conducted in an unreasonable manner. U.S. Const. amend IV. There is no dispute that Mena's detention was a seizure. We therefore must consider—based on the evidence most favorable to Mena—whether her detention was reasonable.

To evaluate claims of unreasonable seizures and detentions in the course of an arrest, investigatory stop, and other seizures of an individual, we apply the "objective reasonableness" standard the Supreme Court adopted in *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In addition to weighing factors "including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," *id.* at 396, 109 S.Ct. 1865, a court must consider whether a detention during a search "is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir.1994).[4] In evaluating whether an officer's conduct is reasonable, we pay "careful attention to the facts and circumstances of each particular case," *Graham*, 490 U.S. at 398, 109 S.Ct. 1865, and analyze the facts and circumstances of the search or seizure "in their totality," *Franklin*, 31 F.3d at 876.

In this case, the officers were investigating a gang-related drive-by shooting—clearly a serious crime. They were authorized under a warrant to search the Mena home and seize property in relation to their investigation of Raymond Romero, the officers' primary suspect. Mena, however, was not the subject of this investigation.[5] Moreover, it was clear

[4] Although the standard under which individuals may assert qualified immunity also bears a reasonableness component, the Supreme Court in *Saucier* directs us to consider excessive force claims and assertions of qualified immunity separately. *Saucier*, 533 U.S. at 204-06, 121 S.Ct. 2151.

[5] In *Franklin*, we distinguished between (1) persons who are arrested, who "are ordinarily suspected of having committed serious, often violent, offenses," and (2) persons who are incidentally detained during a search of a residence, who "may simply be visiting a home or business for an innocuous if not benevolent purpose." 31 F.3d at 876. Although Mena was a resident of the house and not a visitor, she plainly falls into the latter category.

that Mena posed no "immediate threat to the safety of the officers or others." *See Graham*, 490 U.S. at 398, 109 S.Ct. 1865. Nor did she actively resist arrest or attempt to flee. *See id.* Mena had been asleep in her pajamas when the police entered her room. She was unarmed, docile, and cooperative in every respect.

Yet, although searches of Mena's person and room produced no evidence of gang membership or contraband and eighteen well-armed SWAT team officers secured the house in a matter of minutes, the officers handcuffed Mena and kept her in handcuffs for two to three hours. By any standard of reasonableness, in light of the fact that Mena was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat[6] and did not resist arrest—much less resist arrest "actively."[7] Moreover, because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals—such as physical roughness, threatening deadly force, and using handcuffs for an extended period. Although we recognize that police officers are expected "to make split-second judgments"[8] in "difficult and tense"[9] situations, it strains reason to justify the necessity—in these factual circumstances—of pointing a machine gun at Mena's face, roughly

[6] Indeed, both a SWAT commander and one of the defense's expert witnesses testified that non-suspect detainees who pose no threat to police officers or others should be released from handcuffs.

[7] *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (directing courts to consider, *inter alia*, whether a suspect "actively resist[s] arrest"); *see also Franklin*, 31 F.3d at 877 (finding that continuing to hold a detainee in handcuffs after a residence has been secured when there were sufficient officers present to maintain security was unreasonable).

[8] *See Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865.

[9] *See Liston v. County of Riverside*, 120 F.3d 965, 977 (9th Cir.1997).

jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours. We thus have no trouble in concluding that her detention was objectively unreasonable and "unnecessarily . . . degrading [and] prolonged." *Franklin*, 31 F.3d at 876.[10] Thus, Mena has asserted a violation of a constitutional right.

Furthermore, we note with particular emphasis that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status. The officers did so presumably because of Mena's apparent Hispanic/Latino ethnicity, because there was no reason evident in the record to be suspicious of her citizenship status. On these facts alone, we observe that Mena has alleged a violation of a constitutional right.

We recognize that Congress has conferred INS agents limited authority to interrogate those who are or are believed to be undocumented immigrants.[11] But this power may not exceed the restraints on governmental intrusion the Fourth Amendment guarantees. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878-84, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Zepeda v. INS*, 753 F.2d 719, 726-27 (9th Cir.1983). Thus, an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship. *Brignoni-Ponce,* 422 U.S. at 884, 95 S.Ct. 2574 (holding that the Fourth Amendment "forbids

[10] The officers attempt to distinguish Franklin from the facts of this case by emphasizing that Curry (the plaintiff in *Franklin*) was sickly and Mena was not. But we clearly stated in *Franklin* that an individual's frail health raised "additional concerns" in the overall reasonableness analysis. *See Franklin,* 31 F.3d at 876 (listing "additional" concerns—such as detentions of the elderly, children, or individuals "suffering from a serious illness or disability"—beyond whether a search "is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy").

[11] 8 U.S.C. § 1357(a)(1).

stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

In *Brignoni-Ponce,* the Supreme Court affirmed a judgment of this court, and held that the U.S. Border Patrol policy of allowing its agents to stop vehicles in the border area without any reason to suspect illegal activity was unreasonable under the Fourth Amendment. *Id.* In that case, two Border Patrol officers stopped Brignoni Ponce's vehicle and questioned him and his two passengers. The Supreme Court noted that "the officers relied on a single factor to justify stopping [Brignoni-Ponce's] car: the apparent Mexican ancestry of the occupants." *Id.* at 885-86, 95 S.Ct. 2574. The Court held that Hispanic/Latino appearance alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." Thus, while the Court observed that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor," it held that Mexican appearance alone cannot justify stopping drivers who appear to be of Mexican descent to inquire about their citizenship status. *Id.* at 887-88, 95 S.Ct. 2574.

In *United States v. Montero-Camargo,*[12] we observed that "in suggesting that ethnic appearance could be relevant" to an immigration agent's decision whether to detain and question an individual regarding citizenship status, "the [*Brignoni-Ponce*] Court relied heavily on now-outdated demographic information." 208 F.3d at 1132-35. Because demographics had shifted dramatically in the twenty-five years between the *Brignoni-Ponce* decision and our decision in *Montero-Camargo*, we noted—citing revised data from the U.S.

[12] 208 F.3d 1122 (9th Cir.2000) (en banc), *cert. denied sub nom., Sanchez-Guillen v. United States*, 531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 148 (2000).

Census Bureau—that the "statistical premises" on which the Supreme Court based its dictum suggesting that ethnic appearance may be a relevant factor "are no longer applicable. The Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's decision."[13] *Id.* at 1133. To reconcile the shift in the ethnic makeup of the nation's population with the Fourth Amendment's requirement of individualized reasonable suspicion, we concluded that "[r]easonable suspicion requires particularized suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination." *Id.* at 1134-35 (footnotes omitted and emphasis in original).[14] Thus, we held that immigration officials may not use Hispanic/Latino appearance as a factor in determining whether a particularized reasonable suspicion exists to justify stopping and questioning an individual regarding his citizenship.

[13] The *Brignoni-Ponce* Court cited information from the 1970 Census and INS alien registration statistics for the States of California, New Mexico, Texas, and Arizona. *See Brignoni Ponce*, 422 U.S. at 886 n. 12, 95 S.Ct. 2574.

[14] *See also Montero-Camargo*, 208 F.3d. at 1134 n. 21 & n. 22 (noting that the holding in that case did not "preclude the use of racial or ethnic appearance as *one* factor relevant to reasonable suspicion or probable cause when a particular suspect has been identified as having a specific racial or ethnic appearance [but such an individual] may not be stopped and questioned because of appearance, unless there are other individualized or particularized factors which, together with the racial or ethnic appearance identified, rise to the level of reasonable suspicion or probable cause").

In this case, both the police officer[15] and the INS agent questioned Mena about her immigration status, presumably based on nothing more than her name or ethnic appearance.

[15] Aside from the conspicuous lack of a particularized reasonable suspicion, it is doubtful that the police officer had any authority to question Mena regarding her citizenship. Agents of the INS have limited authority to question and detain an individual suspected of being an illegal alien, so long as they have a particularized reasonable suspicion that the individual is in fact an illegal alien. 8 U.S.C. § 1357(a). But the basis for a local police officer to assert such authority is questionable.

Under 8 U.S.C. § 1357(g), the INS may enter into an agreement with a local law enforcement agency under which local law enforcement officers are granted limited authority to investigate, apprehend, or detain undocumented immigrants. Such agreements are subject to many requirements. *See* 8 U.S.C. § 1357(g)(1-10). It is not clear from the record whether the Simi Valley Police Department has entered into such an arrangement. If they have not, the officer who questioned Mena regarding her citizenship improperly assumed such authority. Because the record does not account for the lack or existence of an agreement under 8 U.S.C. § 1357(g) and in any event, as we will explain, the officer violated Mena's Fourth Amendment rights by questioning her citizenship status, we do not express a judgment as to whether the officer was properly vested with the authority to question and detain individuals properly suspected of being undocumented immigrants.

Another law affords local law enforcement officials limited authority to detain and question individuals regarding their immigration status. Subject to the Fourth Amendment, under 8 U.S.C. § 1252c(a), a state or local law enforcement official may arrest and detain an individual if (1) he is illegally present in the United States; (2) he has previously been convicted of a felony in the United States and since left the country or was deported; (3) the state or local law enforcement official obtains "appropriate confirmation" from the INS of the immigration status of the individual; and (4) the state or local law enforcement official only detains the individual for as long as is reasonably required for the INS to assume federal custody of the individual for the purposes of deportation or removal. *See* 8 U.S.C. § 1252c(a); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir.1999). But the police officer who questioned Mena and searched her purse without her consent had no notion about her citizenship status confirmed by the INS, nor did he have any knowledge whether Mena had previously been convicted of a felony and deported. In fact, Mena had no criminal record, nor had she been deported. Accordingly, the police officer could not have asserted the limited authority under § 1252c(a).

Although the officers did not confront Mena in the context of a traffic stop, as the officers did in *Brignoni-Ponce,* the facts of this case sit within the ambit of the Supreme Court's decision in that case. The officers simply did not have the particularized reasonable suspicion the Fourth Amendment requires to justify (1) questioning Mena regarding her citizenship status or (2) searching her purse for immigration documentation without her consent. Therefore, just on these facts alone, we note that Mena alleges a Fourth Amendment violation. In light of the circumstances surrounding her detention generally, the officers' questions and the search of her purse certainly constituted an "undue invasion of privacy." *See Franklin,* 31 F.3d at 876.

Evaluating the facts most favorable to Mena "in their totality,"[16] we conclude that the manner in which she was seized and detained was objectively unreasonable. Thus, Mena's allegations point to a violation of her rights under the Fourth Amendment. Because Mena successfully alleges the violation of a constitutional right, we now proceed to the next step in the qualified immunity inquiry.

B. Whether Mena's Right to be Free From the Type of Seizure She Alleges Was Clearly Established[17]

The Supreme Court in *Saucier* directed that if a constitutional violation could be proved by accepting the facts stated by the party asserting the injury, "the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Therefore, we must determine whether the right to be free from the type of seizure and detention Mena alleges was clearly established.

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[16] *Franklin*, 31 F.3d at 876.

[17] Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question of law reviewed de novo. *See Mabe v. San Bernardino County, Dep't of Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir.2001).

In doing so, a court must look to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

For reasons stated above, we hold that the right to be free from the type of search Mena alleges was clearly established at the time of the search. The analysis used to determine whether a plaintiff alleges a violation of a constitutional right is instructive in determining whether that right was clearly established.[18] We again emphasize that "to find that the law was clearly established . . . we need not find a prior case with identical, or even 'materially similar,' facts. Our task is to determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir.2003) (quoting *Hope*, 536 U.S. at 741, 122 S.Ct. 2508) (citations omitted). Both *Graham* and *Franklin* had been decided by February 3, 1998, so the officers were on notice of their holdings. Although we had not yet decided *Montero-Camargo, Brignoni-Ponce's* requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status had long been the law. The law with respect to unreasonable seizures and detentions was thus sufficiently developed that any reasonable officer in 1998 would have known that the conduct Mena suffered was unlawful.

II. Judicial Interference

A. The Officers' Jury Instruction Argument

The officers argue that they are entitled to a new trial on the claim of unlawful detention because the district court

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[18] *See Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151 ("In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles [that] will become the basis for a holding that a right is clearly established."); *accord Robinson*, 278 F.3d at 1012-13 (quoting same from *Saucier*).

abused its discretion by rejecting the officers' proposed jury instruction on that claim. The officers contend that the instructions the district court formulated failed to recite the relevant law and were prejudicial to the officers. In particular, the officers contend that the instructions were flawed in the following ways: (1) the instructions did not establish that the law allows police limited authority to detain occupants of the premises while the police conduct a proper search; (2) the instructions did not indicate that officers may legally take certain actions to minimize the risk of harm associated with a lawful search; (3) the instructions did not emphasize that detention of residents during a lawful search should generally be considered reasonable under the Fourth Amendment, and that only in "special circumstances" should detention be considered unreasonable; (4) the instructions unfairly emphasized factors in the reasonableness analysis that favored the plaintiff-appellee; and (5) the district court improperly put a "time limit" on how long an officer may lawfully detain an occupant of the premises being searched.

A court must formulate jury instructions so that they fairly and sufficiently address the issues a case presents, accurately state the law, and are not misleading. *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir.2000). When a party alleges error in the formulation of the instructions, we consider the instructions as a whole and apply an abuse-of-discretion standard to determine whether they are misleading or inadequate. *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir.2001). Moreover, an error in instructing the jury in a civil case does not require reversal if it is harmless. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018, 122 S.Ct. 1609, 152 L.Ed.2d 623 (2002).

Without even considering the deferential standard we apply to a district court's formulation of jury instructions, we

conclude that the appellants' arguments plainly lack merit. With respect to unlawful detention, the district court instructed as follows:

> Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable. In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it [is] unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy. A police officer is required to release an individual detained in [connection] with a lawful search as soon as the officers' right to conduct the search ends or the search itself is concluded, whichever is sooner.

The very first sentence of the relevant instructions negates the appellants' first contention; the instructions plainly *do* inform the jury that "a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable." The second purported flaw the appellants cite is the failure to instruct the jury that police officers may take actions to minimize the risk of harm during a lawful search. However, the district court in instructing the jury clearly pointed out that the reasonableness of a detention is directly related to the threat that the suspect poses to "the security of the police . . . or to the ability of the police to conduct the search." The third purported flaw appellants proffer is that the district court's instructions did not indicate "that deten-

tions of residents during the execution of a valid search warrant should generally be considered reasonable under the Fourth Amendment." The first sentence of the relevant instructions correctly characterizes the law: "Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable." Moreover, the district court did not unfairly emphasize factors in the reasonableness analysis that favored the plaintiff-appellee—the officers' fifth argument. The district court correctly invoked factors in the reasonableness analysis as articulated in *Graham,* 490 U.S. at 396, 109 S.Ct. 1865, and *Franklin,* 31 F.3d at 876. As the district court properly stated, those factors include:

> the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others . . . and whether such person is actively resisting arrest. . . . A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged, or if it involves an undue invasion of privacy.

The officers contend, finally, that the district court improperly placed a "time limit" on how long an officer may lawfully detain an occupant of the premises being searched. But the district court correctly noted that a search carries with it only the "*limited* authority to detain occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (emphasis added). As the district court noted in its order denying reconsideration, "[t]he instruction merely makes clear that that authority does not persist once the search ends or becomes improper." Thus, we reject the officers' final argument regarding the district court's jury instructions on the claim of unlawful detention.

The district court's instructions fairly and adequately addressed the pertinent issues this case presented and they were not misleading. Because the district court did not abuse its discretion in formulating these jury instructions, we reject the officers' argument and affirm the district court's judgment with respect to its jury instructions on unlawful detention.

B. Voir dire and Cross-examination

The officers further contend that the district court abused its discretion in conducting the voir dire and cross-examining defense witnesses. This contention is unfounded. The district court has broad discretion over how it conducts voir dire and how it supervises trials. *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir.1998). We review both the manner in which a district court conducts voir dire and supervises a trial for an abuse of discretion. *See Price v. Kramer*, 200 F.3d 1237 (9th Cir.2000).

The officers argue that the district court conducted voir dire in a way that appeared partial to the plaintiff-appellees, although they do not substantiate this claim. With no supporting evidence in the record, the officers contend that the court's questions were fraught with bias. We disagree. At voir dire, the district court has an obligation to "test the jury for bias or partiality." *Monroe*, 248 F.3d at 856 (9th Cir.2001). In this case, the district court did nothing more than ask questions of potential jurors concerning their ability to render a fair judgment. In fact, the court appeared particularly concerned with assembling a jury with no beliefs favoring or prejudicial to law enforcement officers:

> "Do any of you have any feelings about law enforcement officers that would influence you either in favor of them or against them? . . . Would any of you have any difficulty after you listen to the evidence, all of the evidence that both sides introduce, in trying to figure out

> what you would think is reasonable conduct if [the judge] gave you some general instructions about how to define the term reasonable[?]"

Thus, we reject the claim that the district court abused its discretion at voir dire as baseless.

The officers also argue that the district court's cross-examination of defense witnesses appeared partial and influenced the jury. It is entirely proper for judges "to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *Price*, 200 F.3d at 1253 (quoting *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir.1986)). We have held that:

> [a] trial judge's participation oversteps the bounds of propriety and deprives the parties of a fair trial only when 'the record discloses actual bias . . . or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.'

United States v. Parker, 241 F.3d 1114, 1119 (9th Cir.2001) (quoting *Mostella*, 802 F.2d at 361). The officers cite no specific example of conduct by which the district court may have abused its discretion. Indeed, upon a review of the trial record, the district court's participation in the examination of witnesses was at all times appropriate, and frequently resulted in clarifying the evidence for both parties. By way of example, the district court asked:

> [U]nder what circumstances, if any, would you ever conclude it was reasonable to remove the handcuffs?
>
> Is it your practice, when you're conducting investigations about reputed gang members, to question people only if you know something about them or know the person to be questioned?

> And if [the police officers'] conduct in the field reflects judgment that is poor, it's your responsibility to discipline them, correct?

Moreover, the district court instructed the jury not to interpret the court's actions throughout the trial as indicating the court's opinion in the matter, and stressed that the verdict was solely for the jury to consider. *See Parker*, 241 F.3d at 1119 (finding no error when nothing in the record indicated actual bias and the court instructed the jury not to infer anything based on development of facts by the judge). Because it was well within the district court's discretion to examine witnesses to clarify the evidence at trial, we deny appellants' request for a new trial based on improper judicial interference.

III. Punitive Damages

The appellants finally appeal the award of punitive damages to plaintiff-appellee, contending that the award should be vacated as unsupported by the evidence. While we review an award of punitive damages for an abuse of discretion, we review a challenge to the sufficiency of evidence to support the award for substantial evidence. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906-07 (9th Cir.2002). A challenge to a jury award of punitive damages must be rejected if there is substantial evidence to support the award. *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir.1999) (en banc). Substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Combs*, 285 F.3d at 907 (quotations and citations omitted).

A jury may assess punitive damages in an action under 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected

rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). There is evidence in the record indicating that the officers had disdain for the house and its residents. Additionally, record evidence suggests that the officers recklessly disregarded Mena's constitutional rights under the Fourth Amendment. Therefore, because substantial evidence exists to support the jury award of punitive damages in this case, we reject the officers' argument regarding the punitive damages award.[19]

Conclusion

The officers are not entitled to qualified immunity; the district court did not abuse its discretion with respect to its jury instructions, voir dire, and its cross-examination of witnesses; and substantial evidence in the record supports the award of punitive damages. Therefore, we AFFIRM the judgment of the district court.

AFFIRMED.

[19] The officers' assertion that there was no evidence presented at trial that either officer had any direct contact with Mena, even if proved, does not insulate them from liability. Supervisory liability may be found in civil rights actions even if the supervisors in question are not directly involved in the acts leading to the constitutional deprivation. *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir.1991) (en banc). Because there is no dispute that the officers were directly responsible for supervising the search, a jury could properly hold them liable.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed January 14, 2004]

No. 01-56673
D.C. No. CV-98-08512-AHM

IRIS MENA,
Plaintiff-Appellee,
and
JOSE E. MENA,
Plaintiff,
v.

CITY OF SIMI VALLEY; RANDY G. ADAMS; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants,
and
DARIN L. MUEHLER; ROBERT BRILL,
Defendants-Appellants.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before: PREGERSON, REINHARDT, and ARCHER, Jr.,[1] Circuit Judges.

[1] The Honorable Glenn L. Archer, Jr., Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Order;
Dissent by Judge Kleinfeld;
Dissent by Judge Gould

ORDER

The panel has voted to deny the petition for rehearing and the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are denied.

KLEINFELD, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE, and CALLAHAN join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

This is a qualified immunity case, arising out of the detention of a person in a home that was searched pursuant to a search warrant. The panel held that the police violated clearly established law, as any reasonable officer would have known, when they (1) detained a woman for two or three hours in a garage apartment while a search warrant in a shooting case was being executed in her house; and (2) asked her during the detention whether she was a U.S. citizen. The panel's first holding is contrary to Supreme Court authority. The second conflicts with a Seventh Circuit decision. Both holdings unreasonably interfere with sensible law enforcement and are unsupported by precedent. A reasonable police officer would not have known that either holding was the law, so the defendants were entitled to qualified immunity.

Iris Mena lived at her father's home. It was a single-family dwelling turned into a multi-family dwelling by taking in tenants who put individual locks on their doors. The Simi Valley police, with the help of the SWAT team, entered Mena's home to execute a search warrant. They were investigating a gang-related drive-by shooting. As part of that search, Mena was pulled from her bed by an officer, handcuffed, and led to her garage, where she was detained for the duration of the search. She was dressed in a long-sleeved shirt and sweat pants, but was barefoot for a while until an officer brought her shoes and a jacket. During Mena's detention, a local police officer and an INS agent, whom the Simi Valley police department had brought along because of the gang's significant illegal-alien membership, asked Mena about her citizenship and immigration status, including

whether she had her documentation. When she responded that her papers were in her purse, the police officer took them out of the purse.

I. Asking about citizenship.

The panel creates the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion. After analyzing the reasonableness of her detention, the panel wrote that the inquiry into citizenship by itself violated a constitutional right, by unduly invading her privacy:

> Furthermore, we note with particular emphasis that the officers *unduly invaded Mena's privacy* by inquiring unnecessarily into her citizenship status. The officers did so presumably because of Mena's apparent Hispanic/ Latino ethnicity, because there was no reason evident in the record to be suspicious of her citizenship status. *On these facts alone, we observe that Mena has alleged a violation of a constitutional right.*[1]

No reasonable police officer would have imagined that this was the law, and no police officer ought to be prevented from asking about citizenship under these circumstances.

One is routinely and properly required to declare one's citizenship when driving back into Alaska from the Yukon Territory, getting off a plane from London at JFK, filling out the I-9 form that every employee is required to sign, and even applying for a fishing license. Yet in the panel's view, asking Mena the same question "unduly invaded Mena's privacy" in violation of the United States Constitution.[2] Far from knowing that this was clearly established law, the violation of which would result in a loss of qualified immunity, a reasonable police officer could not have imagined it. The panel raised and resolved this issue sua sponte; it was not briefed.[3] The officer asking the question was apparently interested in finding out whether Mena was illegally present in the United States, as many of the gang members were. Surely one constitutionally permissible goal of law enforcement is apprehension of persons whose presence in the United States is itself a crime.[4]

[1] *Mena v. Muehler*, 332 F.3d 1255, 1264 (9th Cir.2003) (emphasis added).

[2] *Id.*

The panel suggests that an INS agent needs "*particularized reasonable suspicion* that an individual is not a citizen" before an INS agent can ask about citizenship and that, even then, a local police officer cannot ask unless the police department has entered into an agreement with the INS under 8 U.S.C. § 1357.[5] The whole notion, though, that there is something intimate and private about one's citizenship that is protected by the Fourth Amendment is wrong (the panel did not make a Fifth Amendment self-incrimination or custodial-interrogation argument).

The only other circuit to consider this question went the other way. In *Martinez-Camargo v. INS*,[6] the local police detained a man for working on his car in a vacant lot, and an INS agent asked him about his citizenship. The man revealed that he was an illegal alien. The Seventh Circuit held that there could be no Fourth Amendment violation because "[q]uestions . . . are neither searches nor seizures."[7] That obviously correct proposition should have been adopted by the panel here.

[3] Mena argued in her brief that the questioning was "intrusive" but never suggested that it rose to the level of a constitutional violation.

[4] *See, e.g.*, 8 U.S.C. § 1326.

[5] *Mena*, 332 F.3d at 1264.

[6] *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir.2002).

[7] *Id.* at 493.

The panel relies instead on two traffic-stop cases, the Supreme Court decision in *United States v. Brignoni-Ponce*,[8] and our en banc decision in *United States v. Montero-Camargo*.[9] Neither case is on point. The gravamen of the interference with individual liberty in both was the stop, not the questioning. Both involved traffic stops of persons with Hispanic appearances near the Mexican border. The public interest in policing the border, in *Brignoni-Ponce*, was weighed against "the interference with individual liberty that results when an officer *stops an automobile* and questions its occupants,"[10] and the "interference with lawful traffic" of automobiles on the highway.[11] Likewise *Montero-Camargo* resolved whether ethnicity and other factors sufficed to establish "reasonable suspicion for the stop" of a car proceeding down the highway.[12]

By contrast, asking Mena about her citizenship did not require a stop. She was already stopped for an entirely independent reason. Her detention arose not at all from her ethnicity or the citizenship inquiry, but rather from her presence at a residence being searched pursuant to a search warrant. Because the questions about her citizenship did not require a stop (the detention already being accomplished) these two cases deciding the constitutionality of stops have no bearing on whether questioning Mena was constitutional.

Even if asking Mena about her citizenship was an unconstitutional invasion of her right to privacy, the officers would nevertheless be entitled to qualified immunity. To defeat

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[8] *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

[9] *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir.2000) (en banc).

[10] *Brignoni-Ponce*, 422 U.S. at 879, 95 S.Ct. 2574 (emphasis added).

[11] *Id.* at 883, 95 S.Ct. 2574.

[12] *Montero-Camargo*, 208 F.3d at 1139.

qualified immunity, the panel would then have needed to establish that a reasonable officer would have known about this novel proposition of law.[13] I am unable to imagine the reasonable police officer that the panel envisions.

II. The detention.

The panel also holds that any reasonable officer would have known that it violated the Constitution to treat Mena as the officers in this case did. The problem with this holding is that, instead of following the Supreme Court's decision in *Michigan v. Summers*,[14] the panel expands the room *Summers* left for an exception so far as to eviscerate the rule. The panel based its holding of unconstitutionality, so obvious as to deprive the officers of qualified immunity on the manner of detention, on the fact that the officers "pushed Mena onto her bed, face down, and placed handcuffs on her," then "yanked her up from her bed by her shirt, and led her out of her room in her pajamas."[15] (According to Mena's own description of her clothes in her response to the petition for rehearing, she was actually wearing "green sweat pants, a black long sleeved shirt, and had no shoes on her feet.") And, "although it was raining outside and Mena was barefoot, the officers directed her outside and into a cold garage where she was detained for two to three hours."[16] (According to the petition for rehearing, the garage had been converted into a bedroom with beds and dressers.) Though the panel apparently concedes that handcuffing her at the outset was permissible, it takes the position that she should have been released from the handcuffs sooner than she was because "it was clear" that

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[13] *Saucier v. Katz*, 533 U.S. 194, 201-05, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

[14] *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

[15] *Mena*, 332 F.3d at 1262.

[16] *Id.*

she, not being the drive-by shooting suspect, posed no threat to the officers.[17]

Michigan v. Summers holds that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." [18] In *Summers*, as here, the police were executing a search warrant for a house, and, as here, there was no warrant or probable cause to search the individual at issue. Also, as here, the individual was detained while the house was searched. For several reasons, including that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," [19] and that "a neutral magistrate rather than an officer in the field has made the critical determination," [20] the detention was held to be a "reasonable" seizure of the person under the Fourth Amendment. *Summers* so held even though, as the dissent noted, the record contained "no evidence whatsoever that the police feared any threat to their safety or that of others from the conduct of the respondent" [21] and, under the holding as the dissent read it, the police could make a person "a prisoner in his own home for a potentially very long period of time." [22]

The panel in our *Mena* decision justifies not applying the holding in the Supreme Court decision in *Summers* on the basis of a footnote in *Summers:*

> Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an

[17] *Id.* at 1263.

[18] *Summers*, 452 U.S. at 705, 101 S.Ct. 2587.

[19] *Id.* at 702-03, 101 S.Ct. 2587.

[20] *Id.* at 703, 101 S.Ct. 2587.

[21] *Id.* at 708 n. 1, 101 S.Ct. 2587 (Stewart, J., dissenting).

[22] *Id.* at 711, 101 S.Ct. 2587.

> unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.[23]

We applied the *Summers* footnote in *Franklin v. Foxworth.*[24] But that really was an "unusual case." In *Franklin,* the detainee was an elderly man dressed only in a T-shirt, whose multiple sclerosis made him unable to walk, sit up, or control his bowels.[25] The police handcuffed him, carried him from his bed, and displayed him for an hour on a living room couch with his genitals exposed to the police, his female caretaker, and her son's girlfriend.[26] We took note of how degrading as well as unnecessary the manner of detention was.[27] That is what distinguishes *Franklin* from *Mena.* The only thing bare about Mena was her feet.

Franklin properly gives content to the *Summers* footnote because it really is an "unusual case" in which the manner of detention would clearly, to any reasonable police officer, go beyond the scope of any lawful justification. The detention in *Franklin* involved entirely gratuitous humiliation and degradation. *Mena,* though, is not "unusual." The detention was not unusually long, was not degrading, and lacked any especially "unusual" circumstances. For their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting. The *Mena* panel says that "it

[23] *Id.* at 705 n. 21, 101 S.Ct. 2587.

[24] *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir.1994).

[25] *Id.* at 874.

[26] *Id.* at 875.

[27] *Id.* at 878.

was clear" that she could be no threat,[28] but nothing in the opinion explains why a young woman could be no threat were she not effectively controlled. If the footnote in *Summers* can be extended to this case, the holding of *Summers* is deprived of any force. More important, under *Mena,* it is hard to see how police officers could ever conduct a safe and effective search of a home pursuant to a valid search warrant.

The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen. And they deserve qualified immunity because when officers are executing a search warrant, they may constitutionally detain the occupants of the premises while the search is being conducted. And they deserve qualified immunity because a reasonable police officer would not have anticipated that the Ninth Circuit would rule to the contrary on both of these issues.

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[28] *Mena,* 332 F.3d at 1263.

GOULD, Circuit Judge, with whom Circuit Judges KOZINSKI and TALLMAN join, dissenting from denial of rehearing en banc:

I would have reheard this case en banc.

First, I disagree with the panel's suggestion that the Constitution is offended by police officers asking Ms. Mena a question about her citizenship. I would follow *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir.2002), holding that a question is not a seizure. *Id.* at 493. Further, even if the Fourth Amendment can be invoked by a query, here the officers had a reasonable basis upon which to inquire, for Ms. Mena was found in a den of thieves, with a gang known by the law to be comprised largely of illegal immigrants. In law, as in life, a person to a degree may be judged by the company they keep, *see, e.g., Maryland v. Pringle*, — U.S. —, 124 S.Ct. 795, — L.Ed.2d — (2003), and nothing in the Fourth Amendment contravenes this common observation of humankind.

Second, the issue of excessive force may be close because of the duration of time that the officers left handcuffs on Ms. Mena. But on this issue we cannot say that a reasonable officer should not have done so. We should instead be more alert to the officers' legitimate concerns for safety. Given the arms anticipated at the locale of the search, and the need to avoid deadly surprise, we should not say that the Constitution precludes ensuring that any person found in potential proximity to weapons is restrained from finding and using a gun on the police. Law enforcement must confront certain unavoidable dangers, but the Constitution does not require that they face avoidable ones.[1]

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[1] The majority's preoccupation with whether Ms. Mena was in pajamas when restrained is besides the point. She was not paraded naked or in humiliating pose. The officers were entitled to restrain her for their safety, whether she was wearing a formal gown or jeans, whether she was

Third, because in this context there was no violation of the Constitution in regard to the questions posed to Ms. Mena on her citizenship, or in regard to the degree of force used to detain and restrain her, under *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), that is the end of the analysis, and we need not go further to assess qualified immunity. But were I to assume a violation of the Fourth Amendment rights that Ms. Mena asserts on either of the above grounds,[2] then I would agree with my colleague Judge Kleinfeld that qualified immunity would be required because no "clearly established" right has been violated.

For these reasons I respectfully dissent.

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wearing pajamas or sweat pants, and without regard to the majority's purported interest in her attire, which seems here to be a mere rhetorical device, wholly unrelated to the substance of the case.

[2] Ms. Mena did not assert that the inquiry on her citizenship status violated her rights. She challenged excessive force in restraint and challenged a search of her purse for papers. The idea that the question about her citizenship posed to Ms. Mena offended her constitutional rights, by analogy to our precedent prohibiting racial profiling as a basis for a car stop, *see United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir.2002) (en banc); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), is extemporaneous, unbriefed, and unwise.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Sep. 6, 2001]

CASE NO. CV 98-8512 AHM (AIJx)

IRIS MENA,

Plaintiff,

v.

CITY OF SIMI VALLEY, et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT OR FOR NEW TRIAL OR FOR JUDGMENT AS A MATTER OF LAW

INTRODUCTION

On June 21, 2001, at the completion of the trial in this case, the jury returned a verdict finding that defendants Darin Muehler and Robert Brill violated plaintiff Iris Mena's Fourth Amendment right to be free from unreasonable seizure by detaining her with force greater than that which was reasonable under the circumstances and by detaining her for a longer period than was reasonable. The jury found defendant Muehler liable to plaintiff in the amount of $10,000 in compensatory damages and $20,000 in punitive damages and defendant Brill liable in the amount of $10,000 in compensatory damages and $20,000 in punitive damages. The Court entered judgment on July 11, 2001.

On July 25, 2001, defendants filed a motion 1) to alter or amend judgment under F.R.Civ.P. 59(e) based on a purported intervening change in qualified immunity law; 2) for a new

trial under F.R.Civ.P. 59(a) on the ground that the Court's unlawful detention jury instruction was legally erroneous; and 3) for judgment as a matter of law under F.R.Civ.P. 50(b) based on an asserted failure of evidence substantiating the jury's punitive damages award. For the reasons set forth below, the Court DENIES defendants' motion.

A. Qualified Immunity

Defendants assert as the basis for their Rule 59(e) motion that "they should have been granted qualified immunity on [the unlawful seizure] claim at the summary judgment stage and that the Supreme Court's opinion in *Saucier v. Katz*, 121 S.Ct. 2151 (2001), which was decided during trial, constitutes an intervening change in the controlling law . . ." Motion, p.2.

The Ninth Circuit has already reviewed and approved this Court's denial of qualified immunity on the unlawful seizure claim at the summary judgment stage of this case. *See Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000). The Ninth Circuit specifically addressed and rejected defendants' contention, made again here, that "they are entitled to qualified immunity as a matter of law because 'a reasonable officer at the scene could have believed that keeping the four detained residents handcuffed and detained together for the duration of the search was reasonably necessary to avoid danger to the officers and residents, reduce the risk of flight, and avoid interference with the search.'" *Id.* at 1039.

Defendants base their challenge to this Court's and the Ninth Circuit's rulings regarding qualified immunity on a purported change in the law effected by *Saucier v. Katz*, 121 S.Ct. 2151 (2001). In that case, addressing excessive force claims, the Supreme Court held that the qualified immunity inquiry requires the "sequential" resolution by the Court of two questions: (1) "taken in the light most favorable to the party asserting the injury, do the facts alleged show the

officer's conduct violated a constitutional right?"; and (2) "whether a right is clearly established," or, in other words, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. In so holding, the Court rejected the Ninth Circuit's position below that "qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact." *Id.* at 2154. The Ninth Circuit's position conflicted with *Anderson v. Creighton*, 483, U.S. 635 (1987).

Defendants' showing that *Saucier* effected an intervening change in the law requiring dismissal based upon qualified immunity is questionable. The Ninth Circuit in *Mena* announced a qualified immunity standard which, like the standard it applied in *Saucier*, called for a two-part inquiry:

> In deciding whether Defendants are entitled as a matter of law to qualified immunity, we must accept the facts in the light most favorable to the Plaintiffs and then determine whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that their conduct was lawful. *See Brewster v. Bd. of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971 (9th Cir.1998); *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.1993). "This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.*

Mena, 226 F.3d at 1036. Defendants do not point specifically to what portion of this standard purportedly deviates from the Supreme Court's statement of the proper qualified immunity inquiry.

However, this Court acknowledges that the Ninth Circuit in *Mena* did not expressly explain why defendants were not entitled to qualified immunity, as distinct from the question of whether a triable issue existed on the unlawful detention issue. Though speculative, defendants could argue that 1) the *Mena* decision conflated the reasonableness inquiry at the heart of plaintiff's unlawful detention claim and the reasonableness inquiry essential to defendants' qualified immunity defense and 2) *Saucier* subsequently disapproved such an approach.

In any event, even under the standard articulated in *Saucier*, defendants are not entitled to qualified immunity. And that is because the first question to consider under *Saucier* is whether, "taken in the light most favorable to the party asserting the injury, do the facts alleged[1] show the officer's conduct violated a constitutional right?" The answer is "yes." Plaintiff alleged and presented evidence that she was only 18 at the time of her detention, was not suspected of any crime, posed no threat to the officers, and did not resist arrest or attempt to flee but nevertheless defendants roused her from sleep at gunpoint, pushed her onto her bed and

[1] Because this case has already been tried, defendants assert, without authority, that "[r]ather than viewing the facts alleged in the complaint, the inquiry may be made in light of the evidence and facts established at trial" Motion, p.11. If the Court does so, at the very least the Court would be influenced by the following factual findings of the jury: 1) defendants "violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by *detaining her with force greater than that which was reasonable under the circumstances*" and 2) "violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by *detaining her for a period longer than reasonable*." Special Verdict Questions 5 and 6 (emphasis added). Even if the Court were not bound to respect such findings if there was an adequate basis to support them, on its own the Court finds that the facts at trial show a constitutional violation.

handcuffed her, refused to inform her why she was being detained, called in the INS to question her about her citizenship status, and kept her handcuffed in her garage for two or three hours, even for a time after the search was terminated. Muller Decl. ¶¶ 4, 7. These facts show that the defendants' conduct violated plaintiff's fourth amendment right to be free from an unlawful seizure. Defendants do not argue otherwise, although at the hearing counsel for defendants stated that they do not concede a constitutional violation. *See* Motion, p.13:7-16.

Defendants assert that it is under the second prong of the *Saucier* immunity inquiry that they enjoy the right to overturn the verdict. The Supreme Court's second step ("if a [constitutional] violation could be made out on a favorable view of the parties' submissions, the [second] step is whether the right was clearly established." *Saucier*, 121 S.Ct. at 2156) is the same as the Ninth Circuit's first step (to find whether the law governing the officer's conduct was clearly established). Defendants emphasize that *Saucier* stated that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Id.* at 2156. They argue that Mena's right was not clearly established. The Court disagrees.

As the Ninth Circuit explained in *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994), "[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." *Id.* (reversing district court's grant of judgment for defendant officers in § 1983 action, and holding that police officers executing search warrant acted unreasonably by removing homeowner from sickbed without providing him a covering and forcing him to remain sitting handcuffed in living room rather than returning him to his bed after they completed the search of his room). The propriety of the search is evaluated under a totality of the

circumstances test, including, but not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 875-77 (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). *See also Heitschmidt v. City of Houston*, 161 F.3d 834, 837-39 (5th Cir. 1998) (reversing district court's dismissal of plaintiff's claim that his detention incident to a search of his home for evidence concerning his roommate's alleged prostitution ring exceeded Fourth Amendment reasonableness because defendants handcuffed plaintiff for four hours, refused him bathroom breaks, lured him from his home to the street, had no information that he was connected to the prostitution ring, and because the search was for evidence, not contraband).

Continuing to hold a detainee in handcuffs or failing to return her to her room after a residence has been secured and when there are sufficient officers present has been held to justify a finding that the seizure was unreasonable. *Franklin*, 31 F.3d at 877 ("There is also no justification for the officers' failure to return Curry to his bed after the search of his room had been completed. . . . Certainly it must have been apparent that returning him to his sickbed would involve no risk at all once the officers had searched his room and made certain that there were no weapons or contraband present. However, even had Curry represented some residual threat if left wholly unattended, there was no reason why he could not simply have been taken back to bed and guarded by one or two of the twenty-three armed officers involved in the operation."); *Heitschmidt*, 161 F.3d at 839 ("Heitschmidt's pleadings allege that there were between ten and twelve police officers in the home during the search. Heitschmidt could have been effectively restrained, and the police interest in facilitating the search could have been vindicated, with a far less intrusive detention.").

Under the principles announced and applied in *Franklin* and *Heitschmidt*, the facts here demonstrate that it was sufficiently clear to a hypothetical reasonable police officer that Iris Mena's Fourth Amendment right was violated by the detention as defendants effected it.[2] Although it is true that both *Franklin* and *Heitschmidt* are factually distinguishable, "[a] right may be clearly established even if there is no previous precedent directly on point." *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001) (citing cases) (affirming finding of no qualified immunity for federal officers in unlawful detention case).

Defendants rely on *Torres v. United States*, 200 F.3d 179 (3d Cir. 1999) to argue that in fact it was not clear that the detention of Iris Mena violated her constitutional rights. In that case, the Third Circuit did grant immunity to officers for their detention of plaintiff, in handcuffs, for several hours on his living room couch during the search of his home. However, unlike here, the plaintiff in *Torres*, apparently an adult male, directed agents to "two firearms in his bedroom," while Iris Mena, an 18 year old female, neither had, nor was aware of, nor directed defendants' attention to any contraband, let alone weapons. Indeed, the agents in *Torres* "retrieved firearms, a Glock 9mm semiautomatic and a Ruger .357 magnum, which might be associated with a violent drug operation." (The agents had reason to believe Torres' house was "a key location in a large scale drug ring" and so also had reason to fear destruction of evidence). The officers in *Torres*

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[2] Defendants also argue that even if *Saucier* did not change the law, defendants are entitled to qualified immunity "in light of the jury's determination that the search was lawful." Motion, p.16. Although it is true that officers have the "limited authority to detain occupants of the premises while a proper search is conducted," *Summers*, 452 U.S. at 705, it is also true that the manner of a detention, as well as its duration, can render it unreasonable, even if most of the detention occurred while a proper search was in progress. *Summers*, 452 U.S. at n.21; *Franklin*, 31 F.3d at 876. Defendants' argument therefore fails.

also found ammunition for a third type of firearm that they did not locate during the search "but which they feared might be present." *Torres* is easily distinguishable on these bases and does not diminish the clarity of Iris Mena's constitutional rights.

B. Unlawful Detention Instruction

Defendants also seek a new trial on the unlawful detention claim under F.R.Civ.P. 59(a) "on the ground that the jury instruction pertaining to plaintiff's claim of unlawful detention failed to include the relevant law and was inadequate and prejudicial to these moving defendants and, as such, constituted an error of law requiring a new trial on this claim." Motion, p.18.

The Court gave the following instruction on unlawful detention:

> Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable.
>
> In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy. A police officer is required to release an individual detained in connection with a lawful search as soon as the officer's right to conduct the search ends or the search itself is concluded, whichever is sooner.

Defendants proffer six purported flaws in the instruction. First, they assert that the instruction does not "inform the jury that police officers may, in fact, *legally* detain occupants during a search." Motion, p.19 (emphasis in original). But the instruction's first sentence states that "[g]enerally, a police officer carrying out a search authorized by a warrant *may* detain occupants of the residence during the search . . ." (emphasis added). The mere absence of the word "legally" or "lawfully," from the clear statement that officers *may* conduct such detentions does not render this instruction invalid or incorrect under the law.

Second, defendants assert that it was error to not specifically instruct the jury that "the authority to detain residents during the execution of a valid search also permits officers to take actions to minimize the risk of harm engendered by the search." Motion, p.20. Defendants correctly cite *Michigan v. Summers*, 452 U.S. 692 (1981), for the dictum statement that a search warrant "may give rise to sudden violence or frantic efforts to conceal or destroy evidence." However, the Court's instruction *did* make clear that the reasonableness of a detention is directly related to the risk of harm associated with the search and the detainee:

> In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including . . . whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee.

The instruction did not improperly ignore the importance of the risk of harm to the reasonableness analysis.

Third, defendants argue that the instruction did not make clear that "generally" detentions pursuant to searches are permissible, but "instead instructed the jury that a detention is

only reasonable based upon" certain circumstances. Motion, p.21. However, the instruction specifically provides that police officers "generally" may conduct detentions pursuant to valid searches and goes on to instruct that the lawfulness of such detentions is subject to reasonableness. This is the law. *See Franklin*, 31 F.3d at 876 ("the test of 'reasonableness' applies to the manner in which the police conduct any seizure, including limited detentions of the type imposed on the occupants of the Curry-Franklin residence by the Portland Police").

Defendants assert next that the Court's instruction unfairly emphasized factors in the reasonableness analysis that favored plaintiff's case against them. The instruction enumerated the following factors:

> you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy—

Though they may not favor defendants, these factors are those specifically enumerated in *Franklin*, 31 F.3d at 876 (stating that "the severity of the crime, whether the person being detained poses an immediate threat, whether he is actively resisting or attempting to flee—may be helpful in the conduct of our inquiry, but so may other factors not ordinarily relevant in deciding how much force is appropriate when making an arrest . . . Persons being arrested are ordinarily suspected of having committed serious, often violent, offenses. Persons being detained while a search of a house is being conducted may simply be visiting a home or business

for an innocuous if not benevolent purpose. A detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy"). Accordingly, defendants' argument fails.

Fifth, defendants assert that the instruction that "[a] police officer is required to release an individual detained in connection with a lawful search as soon as the officer's right to conduct the search ends or the search itself is concluded, whichever is sooner" is not supported by case law and was unnecessary. However, there is no dispute that a search carries with it only the "limited authority to detain occupants of the premises *while* a proper search is conducted," *Summers*, 452 U.S. at 705 (emphasis added). The instruction merely makes clear that that authority does not persist once the search either ends or becomes improper. Clarifying this point of law to the jury was neither improper nor unnecessary.

Finally, defendants assert that the Court failed to instruct the jury on qualified immunity for the detention. However, defendants elsewhere correctly argue that under the law as it exists now, qualified immunity must be determined by the Court, *not* the jury. Defendants cannot have it both ways and accordingly, the Court rejects this argument.

In sum, none of defendants' attacks on the Court's instruction have merit.

C. Punitive Damages

Defendants assert that under F.R.Civ P. 50(b),[3] there was "insufficient evidence to support a punitive damages award." Motion, p.23. The reason they provide is that the moving defendants supervised the search and detentions, but did not personally have direct contact with Iris Mena. Defendants provide no authority for insulating them from liability for punitive damages on this basis.

The jury was properly instructed that punitive damages could be awarded if a defendant's conduct was malicious, defined to be "conduct . . . accompanied by ill will or spite." At least one of these defendants (Officer Brill) volunteered contemptuous, sneering comments about the condition of Mena's home and bedroom to the effect that it was in a state of disarray. Muehler also displayed near-disdain for the occupants of the house. That a jury might find that their conduct was motivated by apparent hostility would be neither surprising nor improper.

Moreover, although Iris Mena was not physically injured during the detention and although she was eventually released, this does not mean that defendants did not recklessly disregard her rights in detaining her in the manner they did. The evidence shown by plaintiff at trial regarding the duration and manner of her detention, described *supra*, is sufficient to support the jury's punitive damages award.

Motion DENIED.

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[3] Plaintiff points out that defendants did not formally move for judgment as a matter of law on the issue of punitive damages at the close of all evidence. But they did object to the Court's proposed punitive damages jury instruction on the grounds that plaintiffs had presented insufficient evidence at trial to support a jury verdict. Under Ninth Circuit law, this objection is "a sufficient approximation" of a directed verdict motion. *See McClaran v. Plastic Industries*, 97 F.3d 347, 360 (9th Cir. 1996).

IT IS SO ORDERED.

DATE: September 6, 2001

/s/ A. Howard Matz
A. HOWARD MATZ
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jul. 10, 2001]

Case No. CV 98-8512 AHM (AIJx)

IRIS MENA AND JOSE E. MENA,
Plaintiffs,

v.

CITY OF SIMI VALLEY, et al.,
Defendants.

JUDGMENT

This action came on regularly for trial on June 12, 2001, in Courtroom 14, of the above-entitled court, the Honorable A. Howard Matz, Judge presiding. The plaintiffs appeared by attorney James S. Muller and the defendants City of Simi Valley, Darin L. Muehler, Robert Brill, Vincent Allegra, William Lappin appeared by David L. Nye and Karen K. Peabody of CARRINGTON & NYE.

A jury of seven persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was instructed by the Court and the cause was submitted to the jury with a special verdict. The jury deliberated and thereafter returned to the court with its special verdict, which said special verdict was filed with the clerk and entered on the minutes and was in words as follows:

"We the jury in the above entitled action, based upon the evidence presented and on the instructions given to us by the Court, now reach our verdict on the issues submitted to us.

Question NO. 1:

(a) Do you find that defendant William Lappin violated the rights of plaintiffs under the Fourth Amendment to the United States Constitution to be free from unreasonable search by failing to properly knock and announce the presence of the officers at 1363 Patricia Avenue and by unnecessarily destroying property during the initial entry?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 2:

(a) Do you find that defendant Vincent Allegra violated plaintiff Jose Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search by unnecessarily using excessive force on the door into the bedroom known as the "converted porch area" at the home Jose Mena owned at 1364 Patricia Avenue?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 3:

(a) Do you find that defendant Darin Muehler violated the Fourth Amendment rights of Jose Mena or Iris Mena to be free from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____	X
Yes	No

(b) If and only if answered "yes" to part (a), then answer this question: What do you find to be the total amount if

damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning the continuation of the search?

Amount: $_____

(If you find that Iris Mena suffered no actual damage, you must award him [sic] nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).

Amount: $_____

(c) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total amount of damages, if any sustained by plaintiff Jose Mena as a result of the conduct of Darin Muehler concerning the continuation of the search? (If you find that Jose Mena suffered no actual damage, you must award him nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a)).

Please respond to the next question.

Question NO. 4:

(a) Do you find the defendant Robert Brill violated the Fourth Amendment rights of Jose Mena or Iris Mena to be free from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 5: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by

detaining her with force greater than that which was reasonable under the circumstances?

	Yes	No
Darin Muehler	X	____
Robert Brill	X	____

Please proceed to the next question.

Question NO. 6: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by detaining her for a longer period than reasonable?

	Yes	No
Darin Muehler	X	____
Robert Brill	X	____

Please proceed to the next question;

Question NO. 7: Concerning Darin Mueher, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10.000.

Please proceed to the next question.

Question NO. 8: Concerning Robert Brill, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of

the conduct of Robert Brill concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10,000

Please proceed to the next question.

Question NO. 13:

(a) Concerning Darin Muehler, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Darin Muehler concerning the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes __X__ No _____

(b) If your answer to the preceding question was "Yes," then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Darin Muehler concerning her detention?

Amount $ $20,000.

Question NO. 14:

(a) Concerning Robert Brill, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Robert Brill concerning the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes __X__ No _____

(b) If your answer to the preceding question was "Yes" then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Robert Brill concerning her detention?

Amount $20,000

It appearing by reason to this special verdict, that plaintiff Iris Mena is entitled to judgment against defendant Darin Muehler in the amount of $10,000.00 in general damages and the amount of $20,000.00 in punitive damages.

It appearing by reason to this special verdict, that plaintiff Iris Mena is entitled to judgment against defendant Robert Brill in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

Plaintiff Iris Mena have judgment against defendant Darin Muehler in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

AND, that plaintiff Iris Mena have judgment against defendant Robert Brill in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

AND, that plaintiff Iris Mena recover costs and disbursements taxed in the sum of $_____ from defendants Darin Muehler and Robert Brill.

AND, that plaintiff Iris Mena recover attorney's fees in an amount to be determined by the court, from defendants Darin Muehler and Robert Brill. Plaintiff shall propose the amounts to defendants' lawyer. If no agreement, make a motion.

DATED: July 9, 2001

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

Submitted by:

LAW OFFICES OF JAMES S. MULLER

By /s/ James S. Muller
JAMES S. MULLER
Attorney for Plaintiffs

Approved as to form and content
CARRINGTON & NYE

By /s/ David L. Nye
DAVID L. NYE
Attorney for Defendants

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 99-56720

IRIS MENA; Jose E. Mena
Plaintiffs-Appellees,
v.
CITY OF SIMI VALLEY,
Defendant,
and
RANDY G. ADAMS; DARIN L. MUEHLER; ROBERT BRILL; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants-Appellants.

Argued and Submitted Aug. 11, 2000
Filed Sept. 22, 2000

Appeal from the United States District Court for the Central District of California; A. Howard Matz, District Judge, Presiding. D.C. No. CV-98-08512-AHM.

Before: NOONAN, TROTT, and BERZON, Circuit Judges.

TROTT, Circuit Judge:

City of Simi Valley Police Chief Randy G. Adams and several police officers (collectively "Defendants") appeal the district court's denial of their motion for summary judgment

based on qualified immunity. Defendants argue that the district court erred by failing to determine whether, under the clearly established law, the officers reasonably could have believed their conduct in obtaining and executing a search warrant for the residence of Jose and Iris Mena (collectively "Plaintiffs") and in detaining Iris Mena was lawful. We have jurisdiction pursuant to 28 U.S.C. § 1291 and, we AFFIRM in part, REVERSE in part, and REMAND to the district court.

I

BACKGROUND

On January 13, 1998, Officers Darin L. Muehler ("Muehler") and Robert Brill ("Brill") of the Simi Valley Police Department ("SVPD") responded to and began investigating a gang-related drive-by shooting in Simi Valley. During their investigation, Officers Muehler and Brill learned that their primary suspect, Raymond Romero, was in possession of a .25 caliber handgun used in the shooting.

In addition, Raymond's brother, Anthony, told Officers Muehler and Brill that Raymond Romero lived on Patricia Avenue in a "poor house," which Anthony explained was "a residence with a large number of subjects residing in a residence designed for one family." Anthony told the officers also that Raymond Romero's friend (and fellow gang member), Genaro Gonzales ("Gonzales"), had lived at the house on Patricia Avenue, but that he believed Gonzales had moved to Mexico. Anthony explained that his brother kept some of his personal property at their mother's house because "Raymond believes these items would be stolen at the Patricia Avenue location." Finally, Anthony gave the officers his brother's phone number, which was 522-9437.

Subsequently, Officer Muehler had a police dispatcher call Raymond Romero's phone number and pretend there was a problem with the "911" system on Patricia Avenue. The dispatcher asked the man who answered the phone to verify

the address from which he was answering. In response, the man stated that the address was 1363 Patricia Avenue. The dispatcher then asked the man to hang up the phone and dial "911," which he did. The incoming phone number was 522-9437, which was listed to Genaro Gonzales. When the dispatcher asked the man if he was Gonzales, he said "No. A friend," and then he said that his name was Raymond. Based on this telephone call and the information learned from Anthony Romero, the officers concluded that Raymond Romero resided at 1363 Patricia Avenue, Simi Valley, California.

The house located at 1363 Patricia Avenue, which Anthony Romero described as a "poor house," was owned by Plaintiff Jose Mena. Although Jose Mena lived at the Patricia Avenue residence only part-time, his daughter, Iris, was a full-time resident. In addition, several other unrelated boarders lived in the Menas' home, renting rooms in the house, space in the garage, and motorhouses and vans parked in the backyard. Notably, Officers Muehler and Brill both had been to the Mena residence on police business on at least two prior occasions.

On January 29, 1998, Officer Muehler executed an affidavit in support of a warrant to search the Mena house for, inter alia, "[d]eadly weapons, specifically firearms including ammunition, casings, holsters and cleaning equipment, knives and accessories such as sheaves; [and] evidence of street gang membership or affiliation with any street gang. . . ." In describing the Mena house, Muehler stated in the affidavit that Anthony Romero had explained that it was a "poor house," meaning "a residence with a large number of subjects residing in a residence designed for one family." However, Officer Muehler's affidavit did not explain that he had been to the Mena residence before, or that he had observed that all of the doors adjacent to the living room were shut and that some of them had padlocks on them.

Based on Officer Muehler's affidavit, a magistrate judge issued a search warrant for Mena's residence.[1] In particular, the warrant authorized the search of:

> 1363 Patricia Avenue, City of Simi Valley, County of Ventura, State of California, which is further described as a single story, single family dwelling, . . . with an attached garage. . . . To include all rooms, attics, basements, closets, storage areas, attached garages, and other parts therein; and the surrounding grounds and any storage sheds, detached garages, or out buildings of any kind located thereon, any safes or locked boxes therein. Any vehicles that are registered to or belonging to occupants of the residence and that are on or adjacent to the property.

Additionally, the warrant authorized the search of the person of Raymond Joseph Romero.

At approximately 7:00 a.m. on February 3, 1998, several officers from the SVPD, including Muehler and Brill, along with a SWAT team, executed the search warrant on Mena's residence. Defendants claim that, before entering the house, they complied with the knock and announce requirement. Specifically, Defendants declare that they (1) "pounded" on the front door, (2) yelled in both English and Spanish that they were from the SVPD, had a warrant, and intended to enter, (3) waited for approximately thirty seconds, and (4) entered the house after receiving no response. Iris Mena [2] says, on the other hand, that the officers failed to comply with the knock and announce requirement. She bases this claim on her assertion that, although she was sleeping in the bedroom

[1] The magistrate also issued a search warrant for the home of Raymond Romero's mother and brother. That warrant is not at issue in this case.

[2] Jose Mena was not present during the warrant service and execution and, therefore, lacks standing to challenge the officers' compliance with the knock and announce requirement. *See United States v. Valencia-Roldan*, 893 F.2d 1080, 1081 n. 1 (9th Cir.1990).

closest to the front door, she was not awakened by the alleged knock and announce. In any event, the officers used a battering ram to force entry into the Mena home.

After entering the house, the officers observed that some of the rooms were locked, many with padlocks on the outside of the doors. Nevertheless, the officers proceeded to force entry into these locked rooms, including the bedroom in which Iris Mena was sleeping. The officers found Iris Mena in bed, forcibly turned her over, handcuffed her, and detained her in the bedroom until the residence was cleared and secured by the entry team. Once the house was secure, the members of the SWAT team left the premises, and the remaining officers searched the residence.

At that point, Iris Mena and the other residents at 1363 Patricia Avenue were taken to the garage where they were detained, in handcuffs, for approximately two to three hours.[3] During this time, the police refused to inform Iris Mena and the others why they were being detained. Moreover, the police contacted the Immigration and Naturalization Service ("INS"), and INS officers arrived at the scene during the search and interrogated the detained residents, including Iris Mena. Finally, when the officers completed their search, they took Iris Mena back into her home, removed her handcuffs, and told her of the purpose of the warrant and search.

On October 19, 1998, Plaintiffs filed suit under 42 U.S.C. § 1983, alleging that Defendants violated their civil rights in connection with the February 3, 1998 search of their home. In July 1999, Defendants moved for summary judgment on

[3] There is a dispute about the length of the detention. While Iris Mena declares that she was detained for approximately two to three hours, Defendants assert that the detention lasted only about an hour and a half. For purposes of summary judgment, however, we construe the facts in the light most favorable to the non-moving party. *Crystal v. United States*, 172 F.3d 1141, 1147 n. 9 (9th Cir.1999). Thus, we assume that Iris Mena's detention lasted between two to three hours.

the ground that Plaintiffs' constitutional rights were not violated, or, alternatively, that Defendants were entitled to qualified immunity. After reviewing the papers and considering oral argument, on August 10, 1999, the district court issued an order denying the summary judgment motion, holding that because (1) "a reasonable trier of fact could conclude that the warrant and/or its execution was 'overbroad,'" and (2) "a reasonable trier of fact could conclude that Iris Mena's detention was unreasonable," Defendants were not entitled as a matter of law to qualified immunity. Defendants now appeal.

II

QUALIFIED IMMUNITY STANDARD

We review de novo a district court's decision denying summary judgment on the ground of qualified immunity. *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998). In deciding whether Defendants are entitled as a matter of law to qualified immunity, we must accept the facts in the light most favorable to the Plaintiffs and then determine whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that their conduct was lawful. *See Brewster v. Bd. of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971 (9th Cir.1998); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). "This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.*

III

ANALYSIS

In their complaint, Plaintiffs allege that Defendants violated their civil rights by (1) obtaining an overbroad search warrant, (2) executing an overbroad search, (3) unlawfully

detaining Iris Mena during the search, (4) conducting the search in an unreasonable manner, and (5) failing to comply with the "knock and announce" requirement. Defendants maintain, however, that they are entitled to qualified immunity because the officers reasonably could have believed that their conduct was lawful under the clearly established law.

A. Overbreadth of the Search Warrant

"The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'" *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (quoting U.S. Const. amend. IV). The Supreme Court has held that this requirement is satisfied "if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States No. 1*, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757 (1925). Here, there is no doubt that the warrant described the "place to be searched"—1363 Patricia Avenue—with sufficient particularity. Rather, the question is whether the warrant was overbroad because it authorized the search of the *entire* premises at 1363 Patricia Avenue, even though the house was a multi-unit dwelling and probable cause related only to Romero's residential unit and, possibly, common areas of the house.

In deciding whether the warrant was overbroad, we begin with the Supreme Court's decision in *Maryland v. Garrison*. In *Garrison*, the police mistakenly believed that the third floor of a building contained only one residential unit at the time they applied for, obtained, and initially executed a warrant to search suspect McWebb's apartment for narcotics. Thus, when the officers entered the first unit on that floor, which they believed to be McWebb's apartment, they observed and confiscated contraband. The officers later discov-

ered, however, that the unit they were in actually was rented by Garrison, not McWebb. As soon as the officers realized they were in Garrison's unit, they terminated the search. Nevertheless, Garrison was charged with a crime based on the contraband found in his apartment. *Garrison*, 480 U.S. at 80, 107 S.Ct. 1013.

Garrison moved to suppress the evidence, arguing, inter alia, that the warrant was overbroad. The Supreme Court held that the evidence need not be suppressed on this ground because "the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued." *Id.* at 86, 107 S.Ct. 1013. The Court explained however, that

> Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. . . . The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.

Id. at 85, 107 S.Ct. 1013.

Relying on *Garrison*, Plaintiffs in this case claim that the warrant was overbroad because, unlike the officers in *Garrison*, Officers Muehler and Brill knew or should have known that there were separate dwelling units within the Menas' house. Plaintiffs base this argument on the following facts: (1) Muehler and Brill had been to the house on at least two prior occasions; (2) during one of his prior visits, Officer Muehler observed that all of the doors adjacent to the living room were shut and that some of them were padlocked; and (3) Anthony Romero told the officers that his brother lived in

a "residence with a large number of subjects residing in a residence designed for one family."

Although we accept these declarations as true, we reject Plaintiffs' assertion that the warrant was overbroad. There is absolutely no evidence in the record sufficient to create a genuine issue of material fact that either Officer Muehler, Officer Brill, or any other officer of the SVPD knew or should have known prior to the application for the warrant that the Mena residence was a multi-unit dwelling. While it is true that Muehler and Brill both had been to the Mena residence on prior occasions, they were in the house for only a short time. Furthermore, although Muehler testified in his deposition that he observed that all of the doors adjacent to the living room were shut and that some of them were padlocked, he also testified that he did "not know[ ] where those doors led." No evidence refutes this statement. Officer Muehler's description in the affidavit prepared for the warrant of the residence is both accurate and materially consistent with the extrinsic facts as he knew them at the time. The fact that Anthony Romero told the officers that his brother lived in a "residence with a large number of subjects residing in a residence designed for one family" does not suggest that the officers knew or should have known that the house was a multi-unit dwelling. The facts in this case are plainly distinguishable from the facts in *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir.1997), wherein we denied qualified immunity to officers because the plaintiffs there made a sufficient showing of "deliberate or reckless dishonesty" on the part of the affiant for a disputed search warrant.

Under the circumstances, Defendants reasonably could have believed at the time the warrant was issued that there was probable cause to search the entire premises. *Cf. United States v. Williams*, 917 F.2d 1088, 1091-92 (8th Cir.1990) (holding that officers were entitled to qualified immunity because they did not know the residence for which they

obtained a warrant actually contained multiple units). Accordingly, we hold as a matter of law that Defendants are entitled to qualified immunity with regard to the claim that the search warrant for 1363 Patricia Avenue was overbroad. In this respect, we remand with instructions to enter a summary judgment in favor of all Defendants.

B. Overbreadth of the Search

Plaintiffs' next argument is that the manner in which the search warrant was executed violated their constitutional rights because, even after realizing that there were multiple units within the Mena house, the police searched the entire premises, including the individual residential units. Defendants counter that the execution of the search was valid because probable cause existed to search the entire premises, not just Romero's room and the common areas. We disagree with Defendants.

Police officers' authority to search premises that are described in a warrant is not unlimited. "If, during the search, the officers become aware that the warrant describes multiple residences, the officers must confine their search to the residence of the suspect." *United States v. Kyles*, 40 F.3d 519, 524 (2d Cir.1994) (citing *Garrison*, 480 U.S. at 86-87, 107 S.Ct. 1013). To determine whether the officers should have realized they were searching the wrong residence, the *Garrison* court set forth the following standard: "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor *depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable.*" *Garrison*, 480 U.S. at 88, 107 S.Ct. 1013 (emphasis added).

Here, shortly after beginning the search, the evidence and the reasonable inferences it supports are sufficient to suggest that the officers should have realized that the Menas' house

was a multi-unit residential dwelling and, thus, that the warrant was actually overbroad. When the officers first entered the house, they observed that many of the rooms were padlocked from the outside. Furthermore, upon forcing entry into the locked rooms, the officers saw that the rooms were set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos. Considering that Officers Muehler and Brill knew that a large number of persons lived in the house, and that Muehler had observed the padlocked doors on a prior occasion, we agree with the district court that a jury could conclude from these facts that the officers' search beyond Romero's room and common areas was unreasonable.

Defendants argue nevertheless that they are entitled to qualified immunity because their conduct in executing the warrant and in searching the entire premises was objectively reasonable. Generally, if a structure is divided into more than one occupancy unit, probable cause must exist for each unit to be searched. *United States v. Whitney*, 633 F.2d 902, 907 (9th Cir.1980). This rule, however, is not absolute. For example, we have held that

> a warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect.

United States v. Alexander, 761 F.2d 1294, 1301 (9th Cir.1985); *see also United States v. Frazin*, 780 F.2d 1461, 1467 (9th Cir.1986).

Defendants maintain that there was evidence that the entire premises were suspect because Romero had access to all parts of Mena's residence. Specifically, they argue that the following facts support this conclusion: (1) Romero previously had secreted a gun at the residence of a fellow gang member; (2) Gonzales, a gang member, had also lived at 1363 Patricia Avenue, although it was believed he had moved to Mexico;

(3) street gang members often hide weapons and evidence in their homes and the homes of fellow gang members; (4) Romero had access to areas of the premises occupied by other residents, as evidenced by the fact that he answered Gonzales's phone; and (5) other residents had access to Romero's possessions, as evidenced by the fact that he was worried that some of his belongings might be stolen. In short, Defendants appear to be arguing that, because Romero and Gonzales were gang associates, and they both lived in this house, the police had probable cause to search the *entire* premises at 1363 Patricia Avenue.

We reject Defendants' argument because, at most, the aforementioned facts provided the officers with probable cause to search Romero's room, Gonzales's room (if he still lived there), and common areas. On the other hand, there is virtually no evidence in the record to show that Romero had access to or was in control of the locked rooms inhabited by the other residents, such as Iris Mena.

As the district court correctly stated, "the law is well established that the officers 'were required to discontinue the search of [Plaintiffs' property not reasonably in Romero's control] as soon as they discovered that there were [other] separate units [on the property] and therefore were put on notice of the risk that they might be in a [portion of the property] erroneously included within the terms of the warrant.'" (quoting *Garrison*, 480 U.S. at 87, 107 S.Ct. 1013). Because a reasonable jury considering all the facts could determine that it was unreasonable for the officers to continue the search, we affirm the district court's denial of qualified immunity on this claim.

C. Unlawful Detention

Third, Plaintiffs contend that Iris Mena's detention was unlawful on the basis of its duration and the manner in which

it was carried out.[4] Defendants once again assert that they are entitled to qualified immunity as a matter of law because "a reasonable officer at the scene could have believed that keeping the four detained residents handcuffed and detained together for the duration of the search was reasonably necessary to avoid danger to the officers and residents, reduce the risk of flight, and avoid interference with the search." Because we conclude that the evidence raises triable issues regarding the reasonableness of the detention, we affirm the district court.

The Supreme Court has held that

> If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.

Michigan v. Summers, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (footnotes omitted). However, the Court included a caveat: "[S]pecial circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case. . . ." *Id.* at 705 n. 21, 101 S.Ct. 2587. Thus, "while detentions of occupants during the period of a search will under most circumstances prove to have been reasonable, a detention may be unreasonable in a particular instance either because the detention itself is improper or because it is carried out in an unreasonable manner." *Franklin v.*

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[4] Plaintiffs also contend that Iris Mena's detention was so extensive that it constituted an arrest, and that such an arrest was not supported by probable cause. This discrete issue is not before us on appeal.

Foxworth, 31 F.3d 873, 876 (9th Cir.1994); *see also Liston v. County of Riverside*, 120 F.3d at 977-79.

In *Franklin v. Foxworth*, this court denied law enforcement officers qualified immunity on an unlawful detention claim. *Foxworth*, 31 F.3d at 876-78. We held that

> A detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involved an undue invasion of privacy. Detentions, particularly lengthy detentions, of the elderly, or of children, or of individuals suffering from serious illness or disability raise additional concerns. Of course, the presence of any of these factors in an individual case does not establish that the detention is unreasonable *per se*. Rather, these factors, along with the *Graham* elements [5] and any other circumstances relevant to an individual case, must be assessed in their totality.

Id. at 876. Applying this standard, the *Foxworth* court concluded that the police "executed the warrant in an unreasonable manner, first by removing a gravely ill and semi-naked man from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours rather than returning him to his bed within a reasonable time after the search of his room was completed." *Id.* at 876-77. In reaching this conclusion, the court reasoned that

> None of the officers had any reason to believe, on the basis of the information they had prior to the search or their observations once in the house, that Curry had committed a crime, or that he was armed. In fact, the officers were not even aware that Curry lived in the house prior to executing the warrant. It should also have been clear to them that Curry was not a gang member.

[5] The "*Graham* elements" are those elements enumerated in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), including the severity of the crime, whether the person being detained poses an immediate threat, and whether the suspect is actively resisting arrest or attempting to flee. *Id.* at 396, 109 S.Ct. 1865.

Id. at 877.

Three years after *Foxworth*, we decided *Liston v. County of Riverside*. In *Liston*, law enforcement officers executed a search warrant for 8293 Saddlecreek Drive, Glen Avon, California. *Liston*, 120 F.3d at 968. The intended target of the search was James "Rocky" Hill. *Id.* At the time the warrant was executed, however, Hill no longer resided at the Saddlecreek residence. *Id.* As a result, the officers mistakenly detained and searched the home of Jim Liston and his family. *Id.*

The Listons sued the officers under 42 U.S.C. § 1983 arguing, inter alia, that their detention was unreasonable and, thus, in violation of the Fourth Amendment. In evaluating this claim, we discussed *Summers* and *Foxworth* and recognized that we must apply a "totality of the circumstances" test. We held that the officers were not entitled to qualified immunity because

> under the Listons' versions of the facts, the officers continued to detain them long after a reasonable officer would have known that the wrong people were in custody and that the house was no longer owned or occupied by Hill—and, thus, long after there was any reasonable cause for continuing to invade the Listons' privacy.

Id. at 979.

We conclude that, like *Foxworth* and *Liston*, the case at bar may be an example of the "unusual case" contemplated by the Supreme Court in *Summers*. In the course of executing a warrant—the intended target of which was Raymond Romero—Defendants forcibly removed Iris Mena from her

bed, handcuffed her, brought her into the garage in her sleeping clothes, and forced her to remain there for two to three hours. Because we have now concluded that this search warrant was not invalid, the *Summers* rule would permit these officers as a matter of law to detain Ms. Mena while "a proper search is concluded." *Summers*, 452 U.S. at 705, 101 S.Ct. 2587. And, if the jury here should conclude that the officers did have probable cause to search the entire premises—even after discovering that the Mena's house was a multi-unit residential dwelling as defined in *Garrison*—then the lawful authority to detain Ms. Mean would continue—and a reasonable officer could so conclude on these facts. However, if the jury should conclude that the officers did not have probable cause to search areas other than (1) Romero's room, (2) Gonzales' room, and (3) common areas, then Ms. Mena's detention rests on a different footing and may be justified only in connection with whatever search the jury concludes to have been "proper."

Defendants have produced no evidence that Ms. Mena had committed a crime, posed any sort of threat to the officers, or was in any way resisting arrest or attempting to flee. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865. In fact, the videotape footage reveals that Ms. Mena, who was only 18 years old at the time, appeared to be sitting quietly and cooperating with the officers. Nevertheless, the police refused to inform Ms. Mena why she was being detained, called out the INS to question her about her citizenship status, and kept her handcuffed throughout the entire two to three hour detention.

Because a jury could conclude on the totality of these facts and circumstances that Iris Mena's detention past the point of a proper search violated the Fourth Amendment, we affirm the district court with respect to her unreasonable detention claim. It, too, shall be decided by a trier of fact.

D. Conduct During the Search

Next, Plaintiffs assert that the officers violated 42 U.S.C. § 1983 by conducting the search itself in an unreasonable manner, in particular by callously and needlessly ransacking their home and destroying property. We have held that "officers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Liston*, 120 F.3d at 979 (quoting *Dalia v. United States*, 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979)). Therefore, the destruction of property during a search does not necessarily violate the Fourth Amendment. *United States v. Becker*, 929 F.2d 442, 446 (9th Cir.1991). Rather, "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Liston*, 120 F.3d at 979; *see also Becker*, 929 F.2d at 446.

Here, Iris Mena testified in her deposition that, during the search, the officers unnecessarily broke down two doors that were unlocked. ("And the door that was in the garage, it was already open, and they broke it anyways. And another room that is right in front of Ray's room, it was open, too, at that time, and they broke it, too."). In addition, Ms. Mena testified that she saw Officer Allegra kicking a door on the patio that was already open and saying "I like to destroy these kind of materials, it's cool." In light of this testimony, Defendants appear to have damaged Plaintiffs' property in a way that was "not reasonably necessary to execute [the] search warrant." *Becker*, 929 F.2d at 446. Because a reasonable officer would have known that such conduct if proved was unlawful, we affirm the district court.

E. Knock and Announce

Lastly, Plaintiffs claim that Defendants violated the Fourth Amendment by failing to "knock and announce" before forcing entry into their home. Specifically, Plaintiffs argue that, because Iris Mena, who was sleeping in the bedroom

nearest the front door, was not awakened by the alleged "knock and announce," the police either did not "knock and announce" at all, or they did not "knock and announce" loudly enough to constitute adequate notice. Defendants respond that, in fact, they did comply with the "knock and announce" requirement and, therefore, are entitled to qualified immunity.

The district court denied Defendants' summary judgment motion on this issue because, in light of Iris Mena's and the officers' contradictory testimony, there is an issue of fact as to whether the police announced themselves before forcing entry into the Mena home. We agree that there is, on summary judgment, a triable issue of fact on this question, and affirm the district court.

IV

CONCLUSION

For the foregoing reasons, we affirm the district court, except as to the claim that the warrant itself was on its face overbroad. On this claim, we reverse the district court and remand for the entry of summary judgment in favor of the Appellants. AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with the views expressed herein.

The parties shall bear their own costs of this appeal.